

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**

REPLY BRIEF OF APPELLANT

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ARGUMENTS

The Appellant, Etheria V. Jackson, relies on the arguments presented in the Initial Brief of the Appellant (“Initial Brief”), and offers the following reply to the State’s Answer Brief of Appellee (“State’s Answer”) dated August 18, 2021.¹ While Mr. Jackson will not reply to every issue and argument raised by the State, he expressly does not abandon the issues not specifically replied to herein.

I. Mr. Jackson’s motion is not procedurally barred or untimely.

The State argues that the trial court properly denied Mr. Jackson’s successive postconviction motion based on *State v. Poole*, 297 So. 3d 487 (Fla. 2020) because the motion is procedurally barred by the law of the case doctrine and untimely under Rule 3.851. AB at 14-15. Additionally, the State argues that there is no reason to deviate from this Court’s decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2017), denying the retroactive application of *Hurst v. Florida*, 577 U.S. 92 (2016) (“*Hurst*”) to defendants whose sentences were

¹ Citations to the trial record are designated as “TR.” and are followed by the appropriate volume and page numbers (TR. volume:page). Citations to the specific record on appeal are designated a “R.” and are followed only by a page number (R. page). Additionally, citations to the Initial Brief and State’s Answer will be designated as “IB” and “AB;” respectively, and they will be followed by the corresponding page number (e.g., IB at 1).

final before *Ring v. Arizona*, 436 U.S. 584 (2002) issued. AB at 15-16. The State's arguments fail for the following reasons.

A. The law of the case doctrine does not apply to Mr. Jackson's *Poole* claims.

According to the State, Mr. Jackson's claims are procedurally barred by the law of the case doctrine because here, he "presents the same issues and arguments" raised in his January 10, 2017, successive postconviction motion brought under *Hurst* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).² AB. at 22-21. The State's argument is misguided.

As recognized by this Court, "[t]he law of the case doctrine is narrower in application[.]" and "it bars consideration *only* of those legal issues that were *actually* considered and decided in a former appeal." *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001) (emphasis added). Although Mr. Jackson cites *Hurst*, and other cases, to support his claim that under *Poole*, his death sentence violates the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and corresponding provisions of the Florida Constitution, the basis for Mr. Jackson's claim are not exclusively found in *Hurst*. Rather, Mr. Jackson's claims are based on

² The motion was denied by the trial court after finding that *Hurst* and *Hurst v. State* did not apply retroactively to Mr. Jackson's case. The trial court's decision was later reaffirmed by this Court in *Jackson v. State*, 237 So. 3d 905 (Fla. 2018).

the underlying rationality used by this Court to recede from *Hurst v State* in *Poole*. Specifically, in *Poole*, the Court noted that in determining what critical elements were necessary to be found by the jury before imposing a sentence of death, *Hurst v. State* got it wrong when it failed to distinguish the eligibility decision from the selection decision.

Here, Mr. Jackson submits that the emphasis on the eligibility decision in *Poole* has specific consequences. Namely, after the Court's decision in *Poole*, defendants are entitled to a specific jury verdict on the issue of eligibility for the death penalty. In other words, Mr. Jackson's current appeal extends beyond his previous *Hurst* claims in that he argues that without an explicit jury finding as to the existence of an aggravator, it is impossible to determine whether his death sentence complies with the constitutional requirements of the Sixth, Eighth, and Fourteenth Amendments.

Furthermore, even if this Court concludes, as claimed by the State, that Mr. Jackson's *Hurst* and *Poole* claims are substantially similar, Mr. Jackson's *Hurst* motion was denied without a decision on merits as to whether the role of the jury in his case was in line with the requirements of the Sixth Amendment, as currently argued in this appeal. R. 89. Consequently, the law of the case doctrine cannot be applied in this case because the issues

currently before this Court were *not* “actually considered and decided” in a previous appeal. See *Juliano*, 801 So. 2d at 107.

B. Mr. Jackson’s motion is not untimely because this Court has not ruled on the retroactive application of *Poole*.

The State also argues that Mr. Jackson’s motion is untimely because *Poole* did not recognize a new substantive constitutional right found to apply retroactively, which is an exemption to Rule 3.851 one-year limitation. Fla. R. Crim. P. 3.851(d)(2)(B). The State’s argument is without merit.

Although it is true that this Court has not found *Poole*’s constitutional requirement that the jury must find at least one aggravator, unanimously and beyond a reasonable doubt, before making a defendant death-eligible, it is also true that this Court has not had the opportunity to rule on this issue. As exemplified by this Court’s decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016) and *Asay*, the Court will consider the issue of retroactivity once it is before it. In fact, if this Court were to find that Mr. Jackson’s claims are timely barred—based on Rule 3.851(d)(2)(B)—without considering Mr. Jackson’s retroactivity claim on the merits, the Court would be creating a catch-22 situation, in which defendants arguing for the first time that a new constitutional right applies retroactively to their cases, would be barred from raising the issue because the Court has not previously ruled on it. As a

result, Mr. Jackson submits that his claims are not untimely or procedurally barred.

C. *Asay* does not prevent the retroactive application of *Poole* to Mr. Jackson's case.

The State argues that *Poole* is not retroactive, therefore, there is no reason to deviate from the Court's decision *Asay*, which would prevent Mr. Jackson from obtaining relief because his sentence was final before *Ring* issued. See AB at 16. Contrary to the State's argument, Mr. Jackson submits that *Asay*, when read together with *Mosley*, supports the retroactive application of *Poole* to his case based on the fundamental fairness doctrine.

First, as previously discussed, Mr. Jackson's *Poole* and *Hurst*'s claims are not the same, therefore, the Court's decision in *Asay* is not binding on Mr. Jackson's *Poole* claim. Second, a reading of this Court's decisions in both *Asay* and *Mosley* strongly suggests that whether to apply a new constitutional right retroactively and what retroactivity standard to use, are questions that require an individualized analysis by the Court. In *Asay*, the Court addressed whether *Hurst* was retroactively applicable to a defendant whose sentence was final before *Ring* issued. *Asay*, 210 So. 3d at 22. In *Mosley*, the Court addressed the same issue, except that the defendant's sentence was final after *Ring*. *Mosley*, 209 So. 3d at 1278. Despite addressing essentially, the same issue, the Court applied different

retroactivity standards in both cases without providing a specific reason for the differential treatment. Namely, in *Mosley* the Court applied both— *Witt v. State*, 387 So. 2d 922 (Fla. 1980) and the fundamental fairness doctrine—retroactivity standards, while in *Asay* the Court applied only *Witt*. *Mosley*, 209 So. 3d at 1274-75; *Asay*, 210 So. 3d at 15-22. The Court’s approach in *Asay* and *Mosley*, therefore, suggests a case-by-case application of the retroactivity standards. Contrary to the State’s argument, *Asay* does not preclude Mr. Jackson from obtaining relief. Rather, *Asay* and *Mosley*, when read together, provide this Court with the necessary discretion to consider the retroactive application of *Poole* under the fundamental fairness doctrine standard in this case.³

³ The individualized assessment of retroactivity is also supported by this Court’s application of the *Witt* standard in *Asay* and *Mosley*. Despite using the same standard, the Court reached different conclusions as to the third *Witt* prong in both cases. The third *Witt* prong requires examination of three factors borrowed from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Asay*, the Court ruled that the first factor—the purpose of *Hurst*—weighed “in favor” of retroactive application. *Asay*, 210 So. 3d at 18. In *Mosley*, the Court ruled that the purpose of *Hurst* weighed “heavily in favor of retroactivity.” *Mosley*, 209 So. 3d at 1278. In analyzing the second factor—extent of reliance on *pre-Hurst* law—the Court found in *Asay* that the extent of reliance on Florida’s unconstitutional death penalty scheme weighed “heavily against” retroactive application to *Asay*. See *Asay*, 210 So. 3d at 20. On the contrary, in *Mosley*, the Court held that the extent of reliance on the same *pre-Hurst* law weighed “in favor” of retroactive application to *Mosley*. *Mosley*, 209 So. 3d at 1281. Finally, the Court also reached a different conclusion in *Asay* and *Mosley* as to the third *Stovall/Linkletter* factor—effect on the administration of justice—finding

II. The fundamental fairness doctrine supports the retroactive application of *Poole's* constitutional requirements to Mr. Jackson's case.

The State argues that the fundamental fairness doctrine based on *James v. State*, 615 So. 2d 668 (Fla. 1993) does not support *Poole's* retroactivity because: (1) *James* was an unwarranted deviation from the established test for retroactivity under *Witt*, AB at 22; and (2) Mr. Jackson's reliance on *Mosley* to further his retroactivity claim is thin because *Poole* is simply an evolutionary refinement in the law, AB at 23-24. The State's arguments are not compelling.

A. *James* and *Witts* frameworks are not incompatible.

In support of its argument that *James* was an unwarranted deviation from the test for retroactivity under *Witt*, the State cites Justice Canady dissenting opinion in *Mosley*.⁴ According to Justice Canady's opinion, in

that it weighed "heavily against" retroactive application as to *Asay*, but in favor of retroactive application as to *Mosley*. See *Asay*, 210 So. 3d at 22; *Mosley*, 209 So. 3d at 1282. The previous examples clearly demonstrate the Court's ability to provide an individualized analysis of retroactivity on a case-by-case basis.

⁴ The State also cites Justice Grimes' dissenting opinion in *James* to support its argument. Although both, Justice Grimes and Justice Canady applied *Witt's* framework to conclude that the defendants were not entitled to relief in each case, see *James*, 615 So. 2d at 671 and *Mosley*, 209 So. 3d at 1291, only Judge Canady's opinion addressed the fundamental fairness as a retroactive standard. Therefore, this Reply brief will only address the latter opinion.

applying *James*, this Court disregards the “essence” of the retroactivity analysis under *Witt*, which is the balancing between “fairness” and the “State’s interest in finality.” *Mosley*, 209 So. 3d at 1291.

Mr. Jackson respectfully submits that the fundamental fairness doctrine does not disregard such balance. On the contrary, the fundamental fairness doctrine intrinsically recognizes the State’s strong interest in finality in the postconviction context by favoring fairness over finality *only* in exceptional cases. See *Witt*, 387 So. 2d at 925 (“[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications.”).

Specifically, the fundamental fairness doctrine creates a narrow exception for defendants who have preserved constitutional claims of a “greater fundamental importance,” that are later recognized by the United States Supreme Court and this Court, as correct interpretations of their constitutional rights. See *Mosley*, 209 So. 3d at 1275 (applying the fundamental fairness doctrine in the *Hurst* contexts because *Hurst*, as well as *James*, concerned “a decision of greater fundamental importance[.]”). By creating a narrow exception to analyze retroactivity claims, the fundamental fairness does not forsake the essence of *Witt*. Rather, it recognizes that “[c]onsiderations of fairness and uniformity make it very difficult to justify

depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.” *Witt*, 387 So. 2d at 925 (internal citations and quotations omitted), see also *Johnson v. State*, 904 So. 2d 400, 420 (Fla. 2005) (Anstead, J., concurring in part and dissenting in part) (stating that *Witt*’s retroactive analysis “embraces concerns about the fairness of the judicial process.”). Consequently, the application of the fundamental fairness doctrine—which applies only under narrow circumstances—to Mr. Jackson’s case is not an unwarranted deviation from the retroactive analysis in *Witt*, but a legally sound exception to the same.

The State also argues that in addition to being a deviation from *Witt*, the fundamental fairness retroactivity standard has been consistently rejected to grant relief based on preservation of *Ring*-like claims. In support, the State cites *Freeman v. State*, 300 So. 3d 591 (Fla. 2020), which in turn relies on *Robinson v. State*, 260 So. 3d 1011, 1015 (Fla. 2018), and without further analysis, for the proposition that the fundamental fairness doctrine does not support the retroactive application of *Hurst*.⁵ See *Freeman*, 300 So. 3d at 593.

⁵ The State also cites *Foster v. State*, 258 So. 3d 1248 (Fla. 2018); and *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020). AB at 23. Although these cases discussed retroactivity under *Witt* in various contexts, they do not specifically

Although *Robinson* rejected the application of the fundamental fairness doctrine in that specific case, *Robinson* did not preclude the application of the doctrine to *Ring*-like claims under other circumstances. Notably, the court provided two reasons *not* to apply the fundamental fairness doctrine in *Robinson*. First, the Court found that Mr. Robinson’s fundamental fairness argument was raised on a footnote which the Court concluded was “cursory” and “insufficient to raise a claim for review.” *Id.* at 1015 (internal citations omitted). Second, the *Robinson* Court concluded that the fundamental fairness doctrine did not apply to Mr. Robinson’s case because he failed to preserve a *Ring*-like claim at trial. *See id.*

When reviewing the reasons provided by this Court to reject the application of the fundamental fairness doctrine to Mr. Robinson’s case, the major inference to be drawn is that the fundamental fairness doctrine does not apply where it has not been properly raised. That is not the situation in Mr. Jackson’s case, where at trial and during postconviction proceedings, Mr. Jackson fully raised and argued challenges to the ability of the judge, rather than the jury, to find the aggravators that made him death eligible. *See* TR I:63-65; R. 49-51.

address the application of the fundamental fairness doctrine within a *Ring*-like claim. As a result, Mr. Jackson will not address these cases.

Freeman and *Robinson*, therefore, do not support the State's generical statement that the fundamental fairness retroactivity standard is frequently rejected by this Court to grant relief based on preservation of *Ring*-like claims.

B. Whether *Poole* is an evolutionary refinement in the law is not relevant to the application of *Poole* under the fundamental fairness doctrine.

The State argues that Mr. Jackson's reliance on *Mosley* is weak because *Hurst*, and consequently *Poole*, are an evolutionary refinement in the law. See AB at 23-24 (citing *Brown v. State*, 304 So. 3d 243, 280-81 (Fla. 2020) (Canady, C.J., concurring in result) (stating that "*Poole* makes clear that *Hurst v. Florida* was an evolutionary refinement in the law that should not be applied retroactively."). The State's argument is irrelevant.

Although, as previously discussed, the fundamental fairness doctrine and *Witt* are not incompatible retroactivity standards because both are concerned with the balance between fairness and finality, the specific test used to determine the retroactive application of a constitutional decision under both retroactivity standards is different.

Under the precedent of this Court, the fundamental fairness doctrine standard does not ask the Court to decide whether *Poole* is an evolutionary refinement in the law. See *James*, 615 So. 2d at 669 (requiring no such

analysis). Rather, the fundamental fairness doctrine requires the Court to answer whether it would be unfair to deprive a defendant of “a decision of greater fundamental importance” that recognizes a constitutional claim the defendant has preserved throughout his criminal case. *Mosley*, 209 So. 3d at 1275. Given that the fundamental fairness doctrine is not concerned with whether *Poole* is an evolutionary refinement in the law as *Witt* is, the State’s argument is not compelling.

III. Mr. Jackson’s claim under the Sixth Amendment is not meritless because the jury was not instructed that aggravating circumstances must be found unanimously.

The State argues that Mr. Jackson’s Sixth Amendment claim is meritless because he benefitted from a properly instructed jury, which is presumed to have found the requisite aggravating circumstance, proven beyond a reasonable doubt, to make him eligible for death. See AB at 39. However, a close reading of the jury instructions supports a contrary conclusion.

Although Mr. Jackson’s sentencing-phase jury was correctly instructed that to establish an aggravator the State’s burden of proof is beyond a reasonable doubt, the jury instructions failed to advise the jury that any aggravator should be found unanimously. See TR. VI:1472-78. In fact, Mr. Jackson’s jury was simply instructed that a majority of votes was enough to

impose the death penalty. *Id.* Based on the plain language of the jury instructions, all that can be presumed here is that Mr. Jackson’s jurors were free to make individual conclusions as to what aggravators were proven by the State beyond a reasonable doubt in this case. Individual juror findings, however, are not sufficient to make a defendant eligible for death under *Poole*. Consequently, the State’s reliance on the presumption that the jury performed its duties as instructed is not enough to make Mr. Jackson’s death sentence compliant with the Sixth Amendment right to a jury trial.

Further, even if the jury was properly instructed in this case, the State’s argument ignores the fact that Mr. Jackson was sentenced under a sentencing scheme found unconstitutional by the United States Supreme Court because it “required the judge alone to find the existence of an aggravating circumstance[.]” *Hurst*, 577 U.S. at 103; see also *id.* at 99-100 (“the Florida sentencing statute does not make a defendant eligible for death until ‘findings *by the court* that such person shall be punished by death.’ Fla. Stat. § 775.082(1) (emphasis added)”). In light of the United States Supreme Court’s decision in *Hurst*, it is misguided to insist that the jury verdict in this case, clearly established that the jury found—as required by the Sixth Amendment right to a jury trial—that Mr. Jackson was eligible for the death penalty.

The State also argues that a prior conviction exists in this case; therefore, Mr. Jackson was death-eligible. Mr. Jackson restates the arguments raised in his Initial Brief regarding the erosion of the *Almendarez-Torres*' prior conviction exception in light of the United States Supreme Court's jurisprudential developments with regards to the Sixth Amendment right to a jury trial. See IB at 29-31.

Further, Mr. Jackson maintains that only a contemporaneous conviction used as an aggravator comports with the requirement of the Sixth Amendment right to a jury trial. On this point, the State's dismissal of Mr. Jackson's discussion regarding the lack of a contemporaneous aggravator as "irrelevant" is disingenuous. See AB at 38, n.14. As discussed above, Mr. Jackson based his successive motion to vacate his sentence on *Poole*. *Poole* recognizes a prior conviction as one arising out of a contemporaneous conviction. A contemporaneous conviction is enough to establish an aggravator because, in that situation, all the elements of the offense, including those facts that "subjects an individual to a greater penalty," are found by the jury at the guilt phase. Given that Mr. Jackson was indicted and convicted only of first-degree murder, a prior conviction as understood under *Poole* does not exist in this case.

In sum, neither the State's emphasis on the presumption that the jury followed the jury instructions in this case nor its arguments that a prior conviction exists, erase the merit to Mr. Jackson's Sixth Amendment claim under *Poole* because neither the guilty verdict nor the jury recommendation of death, permit to conclude that Mr. Jackson was eligible for the death penalty.

IV. Mr. Jackson's claim under the Eighth Amendment is not meritless because Mr. Jackson's sentence is illegal and arbitrary under *Poole*.

Mr. Jackson's Eighth Amendment claim is a simple one. He claims that without a unanimous jury finding of at least one aggravator in his case, he is not eligible for the death penalty.⁶ Consequently, the imposition of the death sentence by the trial court was illegal and arbitrary. The State counterargues that Mr. Jackson's Eighth Amendment claim is meritless because the jury was properly instructed on aggravating circumstances, and the jury acted according to the instructions. See IB at 43.⁷

⁶ The State characterizes Mr. Jackson's claim as a "mantra." AB at 38. Mr. Jackson characterizes it as a constitutional right to which he is entitled.

⁷ The State also argues that Mr. Jackson's discussion of *Spaziano v. Florida*, 468 U.S. 447 (1984) in relationship to the Eighth Amendment appears misplaced and fails to recognize that *Spaziano* was overruled by *Hurst*. See AB at 39-40. The purpose of the analysis under *Spaziano*, as laid out in the Initial Brief, is to clarify that the Court's holding in *Poole*, stating that the Eighth Amendment to the United States Constitution and the Florida Constitution do not require a unanimous recommendation of death, *Poole*

The State's counterargument fails in the phase of the *Poole* decision, requiring unanimity as to the existence of at least one aggravating circumstance as a prerequisite to imposing the death penalty on a criminal defendant. As discussed above, a look at the underlying record shows that the jury instructions, in this case, failed to advise the jury about the unanimity requirement, and the jury recommendation of death by a vote of 7 to 5 proves as much.

If the Court accepts Mr. Jackson's argument that *Poole* applies retroactively to his case, his death sentence could not stand because the maximum penalty to which Mr. Jackson is subject to is life in prison. Fla. Stat. § 775.082(1). It naturally flows from there that Mr. Jackson's death sentence is illegal because it fails to comport with statutory limitations. *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998) (stating that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by

297 So. 3d at 505 (citing *Spaziano*, 468 U.S. at 464-65), cannot be used to possibly argue that the jury's death recommendation by a vote of 7 to 5, was sufficient to establish the eligibility finding in this case. The undersigned considered the discussion necessary because *Spaziano*, contrary to the State's argument, is still partially good law. See *Hurst*, 577 U.S. at 102 (stating that "*Spaziano* and *Hildwin*" are "*overruled to the extent* that they allow a sentencing judge to find an aggravating circumstance, independent of the jury's fact-finding, that is necessary for imposition of the death penalty." (Emphasis added)).

definition ‘illegal’”). The Eighth Amendment guarantees an individual the right not to be subjected to excessive sanctions. The right flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (internal citations omitted). Therefore, under the Florida Rules of Criminal Procedure, Mr. Jackson is not only entitled to have his sentence vacated under Rule 3.851 but also corrected under Rule 3.800(a).⁸

⁸ Although the State argues that Rule 3.800(a) does not apply to death penalty cases, neither the plain language of Rule 3.800 nor its previous amendments excluded the application of the Subdivisions (a) to death penalty cases. On the contrary, subdivisions (b) and (c) of Rule 3.800, adopted in 1996 and 1977 respectively, provide for the specific exclusion of capital cases to their application. Under Florida principles of statutory interpretation, the court must look to the plain language of the statute or rule in this case. See *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla. 1982). Where the language is clear and unambiguous, it must be given its plain and ordinary meaning. See *Smith v. Crawford*, 645 So.2d 513 (Fla. 1st DCA 1994) (quoting *State v. Egan*, 287 So.2d 1, 4 (Fla.1973) (noting that “[e]ven where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.”)). Further, “it is a commonly accepted principle of statutory construction that the express exemption of one thing in a statute, and silence regarding another, implies an intent not to exempt the latter.” *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla.1988); *Thayer v. State*, 335 So.2d 815 (Fla.1976) (“where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned”). Applying the latest principle to this case, the most reasonable interpretation of subdivision (a), read together with subdivisions (b) and (c), is that The Florida Bar Criminal Procedure Rules Committee and the Florida Supreme Court sanctioning the rule knew how to limit the application of all

Furthermore, Mr. Jackson’s death sentence could not stand because 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.). The Eighth Amendment commands “a capital sentencing scheme where the discretion of imposing death is narrowed and channeled.” See *id.* at 196-97 (stating that a finding of an aggravating circumstance “narrows the class of murderers” upon whom the death penalty can be imposed). The existence of an aggravating circumstance serves as a filter by “narrow[ing] the class of persons eligible for the death penalty[.]” *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The requisite finding of an aggravating circumstance, therefore, provides a constitutional process that ensures reservation of the death penalty for only the worst of the worst offenders. Given that the underlying record clearly shows that Mr. Jackson’s death penalty was imposed without a unanimous jury finding on the existence of at least one aggravator, Mr. Jackson’s death sentence violates his constitutional rights under the Eighth Amendment, and the State’s argument is meritless.

subdivisions to death penalty cases but chose not to do so. This interpretation is consistent with the plain language of Rule 3.800 at its adoption and subsequent amendments. Consequently, the plain language of Rule 3.800(a) supports its applicability to death penalty cases.

V. Mr. Jackson's claim under the Fourteenth Amendment is not meritless because the jury recommendation cannot be used to establish that all the critical elements of his offense were found by the jury.

The State argues that Mr. Jackson's Fourteenth Amendment claim is meritless because the record before the Court shows that he was not deprived of due process protections. Specifically, the State argues that Mr. Jackson's penalty phase jury performed its constitutional duty, and that Mr. Jackson's prior convictions made him eligible for the death penalty. AB at 39. The State's argument is an attempt to rely upon the advisory jury recommendation to conclude that all elements of the crime were properly found by the jury.

Under the Fourteenth Amendment to the United States Constitution, and Article I, Sections, 2, 9, 16(a), and 22 of the Florida Constitution, the jury is to determine the elements of an offense. The finding of fact statutorily required to render a defendant death-eligible is an element of the offense that separates first-degree murder from capital murder under Florida law. See *Poole*, 297 So. 3d at 505 (stating that aggravating circumstances are considered elements of the crime that must be established by the jury beyond a reasonable doubt).

Because Mr. Jackson's death sentence was obtained under the exact death penalty scheme found unconstitutional in *Hurst*, neither a presumption

that the jury followed the law as instructed nor the general recommendation of death by a vote of 7 to 5 served to conclude that the jury found, unanimously and beyond a reasonable doubt, all the elements of his offense as required under the Sixth and Fourteenth Amendments of the United States Constitution. See *Hurst*, 577 U.S. at 100 (cautioning against using an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence are made by a jury because under the pre-*Hurst* Florida sentencing statute, the judge not the jury made such finding).

Furthermore, because the State proceeded against Mr. Jackson under an unconstitutional system, Mr. Jackson was denied specific due process protections secured by Article 1, Section 9 of the Florida Constitution. Namely, the State failed to present the aggravating factors as elements for the grand jury to consider in determining whether to indict Mr. Jackson. Without an indictment containing aggravators as an element of the crime, Mr. Jackson's guilt-phase jury was never informed of the full "nature and cause of the accusation" against him, and the later conviction for first-degree murder violated Mr. Jackson's rights to due process of law secured by Article 1, Section 9 of the Florida Constitution.

Mr. Jackson acknowledges that contrary to his claim, the Court in *Pham v. State*, explained that “a defendant is not entitled to notice of every aggravator in the indictment because the aggravators are clearly listed in the statutes.” 70 So. 3d 485, 496 (Fla. 2011) (internal citation omitted).⁹ Similarly, the United States Supreme Court in *Almendarez–Torres v. United States* held that an indictment “need not set forth facts relevant only to the sentencing of an offender found guilty of the charged crime.” 523 U.S. 224, 228 (1998). However, in *Jones v. U.S.*, the United States Supreme Court recognized the difference between elements of an offense and sentencing factors when it stated, “[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given

⁹ In *Lott v. State*, this Court recently rejected the argument “that aggravating circumstances must be alleged in the indictment.” 303 So. 3d 165, 166 (Fla. 2020) (citing to *Pham v. State*, 70 So. 3d at 496; *Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006); *Ibar v. State*, 938 So. 2d 451, 473 (Fla. 2006); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003)). A survey of the cited cases shows that they rely on case law abrogated by the United States Supreme Court’s decision in *Hurst v. Florida*. Therefore, it is unclear whether they remain valid precedent. See e.g., *Kormondy v. State* (citing to *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002), both decisions abrogated by *Hurst*); *Ibar*, 938 So. 2d at 473 (citing *Kormondy v. State*, without further analysis); *Coday*, 946 So. 2d at 1006 (citing to *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2003) also abrogated by *Hurst*).

that *elements* must be charged in the indictment.” 526 U.S. 227, 232 (1999) (emphasis added).

The language of *Hurst* and *Poole* plainly characterized aggravating circumstances as elements of the crime that must be established beyond a reasonable doubt. *Poole*, 297 So. 3d at 505; see also *Ring*, 536 U.S. at 603-05, 609 (concluding that the determination as to whether one or more aggravating circumstances existed was the functional equivalent of an element under Arizona’s capital sentencing scheme). This Court’s characterization of aggravating circumstances as elements of the crime, when read in light of the Supreme Court’s decision in *Jones*, necessarily suggests that a criminal defendant’s right to due process entitles him to a proper indictment, listing all elements of the offense, including aggravating circumstances.

Given that Mr. Jackson’s indictment did not list the aggravating circumstances intended to be used by the State in prosecuting his case, Mr. Jackson’s sentence and conviction should be vacated because they were obtained in violation of his due process rights under the Fourteenth Amendment and the Florida Constitution. See *Fiore v. White*, 531 U.S. 225, 228–29 (2001); *In re Winship*, 397 U.S. 358, 364 (1970)).

Finally, the Fourteenth Amendment also protects criminal defendants against the application of laws that would result in unequal punishment for similar offenses. 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.”). The application of the death penalty to a defendant whose jury verdict only exposes him to a life sentence is a clear example of the unequal application of punishment prohibited by the Fourteenth Amendment of the United States Constitution. Given that the advisory jury recommendation in Mr. Jackson’s case cannot be used to establish his eligibility for the death penalty, his capital sentence is, therefore, in violation of such constitutional provisions and should be vacated.

CONCLUSION

The fundamental fairness doctrine is a valid retroactivity standard under the legal precedent of this Court. *Poole* is retroactively applicable to Mr. Jackson’s case under this doctrine because Mr. Jackson properly preserved his claim that it should be the role of the jury not of the judge to find the aggravators that made him eligible for the death sentence.

The Sixth Amendment right to a jury trial as understood under *Poole* entitles Mr. Jackson to an explicit jury finding on the issue of eligibility. Because no such jury finding exists in this case—and neither the presumption that the jury properly followed the jury instructions, nor the advisory recommendation of death by a 7 to 5 vote can serve as substitutes—Mr. Jackson’s death sentence violates the Sixth Amendment right to a jury trial.

Further, without a clear finding that Mr. Jackson was eligible for the death sentence, his death sentence is illegal and arbitrary under the Eighth Amendment, and his sentence and conviction, are both a violation of his due process rights under the Florida and federal constitutions. Consequently, Mr. Jackson requests that this Court reverse the lower court’s rulings and vacate his conviction and sentence.

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) on September 15th, 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, and the Florida Supreme Court's Scheduling Order.

/s/Natalia C. Reyna-Pimiento

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