No. ________

IN THE SUPREME COURT OF THE UNITED STATES

ETHERIA VERDELL JACKSON,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

JULISSA R. FONTÁN*
FLORIDA BAR NUMBER 0032744
LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
TELEPHONE: (813) 558-1600
COUNSEL FOR THE PETITIONER
COUNSEL OF RECORD

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether a jury's advisory recommendation of death which does not identify the specific aggravators found, nor whether the aggravators were found unanimously by the jury, is sufficient to determine the death eligibility of a defendant under the Sixth Amendment right by a trial by jury as interpreted under *Hurst v. Florida*, 136 S. Ct. 616 (2016)?

II. Whether the Florida Supreme Court violated the Eighth Amendment in affirming Mr. Jackson's capital sentence because the jury's advisory recommendation of death is insufficient to establish Mr. Jackson's death eligibility, therefore, making the application of the death penalty an excessive punishment in this case?

III. Whether the Florida Supreme Court violated the fourteenth Amendment in affirming Mr. Jackson's capital sentence because not all the critical element of crime were sent to the jury?

LIST OF PARTIES

All parties appear on the caption to the case on the cover page. Jackson was the Appellant below. The State of Florida was the Appellee below.

TABLE OF CONTENTS

CONTENTS **PAGE(S)**

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES AND RULES

OTHER AUTHORITIES

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner, Etheria Verdell Jackson, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court and address the important questions of federal constitutional law presented. This case presents a fundamental question concerning the Sixth Amendment right to a jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *Jackson v. State*, ---So. 3d ---, 2022 WL 178204 (Fla. 2022) and reproduced at App. A. The trial court's order denying Jackson's successive motion for post-conviction relief is reproduced at Appendix B.

JURISDICTION

The opinion of the Florida Supreme Court was entered on January 20, 2022. (Appendix A). A Motion for Rehearing was filed and denied by the Florida Supreme Court. (Appendix C). This petition is due on May 31, 2022 and is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI.

The Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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 protection of the laws.

STATEMENT OF THE CASE

A. Florida's Capital Sentencing Structure

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court described the capital sentencing scheme under which Jackson was sentenced to death.[1]

> First-degree murder is a capital felony in Florida. *See* Fla. Stat. § 782.04(1)(a) (2010). Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. § 775.082(1). "A person who has been convicted of a capital felony shall be punished by death" only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Ibid*. "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid*.
>
> The additional sentencing proceeding Florida employs is a "hybrid" proceeding "in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Ring v. Arizona*, 536 U.S. 584, 608, n.6 ... (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. § 921.141(1) (2010). Next, the jury renders an "advisory sentence" of life or death without specifying the factual basis of its recommendation. § 921.141(2). "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." § 921.141(3). If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid*. Although the judge must give the jury recommendation "great weight," *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (*per curiam*), the sentencing order must "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) (*per curiam*).

---

[1] In *Hurst*, this Court considered Florida's capital sentencing scheme as it existed in 2010. *Hurst*, 136 S. Ct. at 620. Jackson was sentenced to death under Florida's capital sentencing scheme as it existed in 1986. However, as relevant here, those two schemes were identical. Compare Fla. Stat. § 775.082(1) (2010) and Fla. Stat.§ 921.141 (2010) with Fla. Stat. § 775.082(1) (1986) and Fla. Stat.§ 921.141 (1986).

Since this Court's decision in *Hurst*, legislative changes have been made to Florida's capital sentencing scheme. *See* Act effective March 7, 2016, §§ 1, 3, 2016 Fla. Laws ch. 2016-13 (codified as amended at Fla. Stat.§ 775.082(1) (2017) and Fla. Stat.§ 921.141 (2017); Act effective March 13, 2017 §§ 1, 3, 2017 Fla. Laws ch. 2017-1 (codified as amended at Fla. Stat.§ 775.082(1) (2017) and Fla. Stat. § 921.141 (2017). Unless otherwise stated, references in this petition to Florida's capital sentencing scheme refer to the scheme that was in existence prior to those changes, that was considered in *Hurst*, and under which Jackson was sentenced to death.

Hurst, 136 S. Ct. at 620.

B. Trial Court Proceedings and Direct Appeal

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[2], 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.[3]

The trial court sentenced Mr. Jackson to death on August 8, 1986, finding five aggravating circumstances[4] 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 269 (Fla. 1988).[5] Mr. Jackson then filed a petition for certiorari to this Court, which was denied on January 23, 1989. *Jackson v. Florida*, 109 S.Ct. 882 (1989).

C. State Post-Conviction Motion and Successive Post-Conviction Motion

Jackson filed a motion for post-conviction relief under Fla. R. Crim. P. 3.850. The trial court summarily denied Jackson's 3.850 motion for post-conviction relief on March 25, 1991,

[2] See Fla. Stat. § 775.082(1) (1986) and Fla. Stat.§ 921.141 (1986).
[3] 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).
[4] 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.
[5] The Court found, however, that the trial court erred in improperly considering the cold, calculated, and premeditated aggravating factor in the case, but found the trial court's error harmless. *Jackson v. State*, 530 So. 2d 269 (Fla. 1988).

without requiring a response by the State and without holding a hearing. An appeal of the denial of post-conviction relief was filed along with a state habeas petition on September 9, 1993. The Florida Supreme Court affirmed the denial of post-conviction relief, and denied Jackson's state habeas petition. *Jackson v. State*, 633 So. 2d 1051 (Fla. 1993).

Jackson filed a petition for federal habeas relief for which nine of Jackson's claims were procedurally barred and the remainder were denied on December 15, 2003. During the pendency of Jackson's federal habeas petition, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was decided, and Jackson immediately brought the case to the court's attention in a supplemental brief.[6] See *Jackson v. Moore*, Case No. 3:94-cv-00492-HES-PDB, Dkt. 41 (Jan. 31, 2001). Jackson also filed a subsequent motion to amend adding *Ring v. Arizona*[7], on July 8, 2003. The district court denied the Motion on January 29, 2004, in a single paragraph, stating only that the Motion was denied. The denial was upheld by the Eleventh Circuit Court of Appeals. *Jackson v. Crosby*, 375 F.3d 1291 (11th Cir. 2004). This Court denied certiorari and the merits of Jackson's appeal were never heard.

Subsequently, Jackson filed a successive motion for post-conviction relief based upon *Hurst v. Florida*[8] and *Hurst v. State*[9]. The successive motion was summarily denied. Jackson appealed the denial of his successive motion for postconviction 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

[6] Jackson raised this issue at the first opportunity to do so, which was shortly after the decision was announced.
[7] *Ring v. Arizona*, 536 U.S. 584 (2002).
[8] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[9] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

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).

Since this Court's decision in *Hurst v. Florida*, the Florida Supreme Court has gradually narrowed its interpretation of *Hurst v. Florida* and has also attempted to further narrow the class of people to which *Hurst* will apply. To this end, the Florida Supreme Court issued its decision in *Poole v. State*, 297 So.3d 487 (Fla. 2020). Jackson filed a successive postconviction motion, partially based on Poole, on January 25, 2021. On March 26, 2021, the trial court denied the motion.

D. Proceedings in the Florida Supreme Court

Jackson appealed the denial of his successive motion for post-conviction relief. As relevant here, Jackson asserted in his initial brief 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 Jackson was eligible for the death penalty as required under the Sixth Amendment to the United States Constitution. Further, Jackson argues that because he was not eligible for the death penalty his sentence exceeds the statutory maximum for a first-degree murder. Consequently, Jackson's sentence is illegal and arbitrary and a violation of the Eighth and Fourteenth amendments of the United States Constitution.

The Florida Supreme Court denied Jackson's appeal on January 20, 2022. App. A.

Jackson's arguments were summarily denied.

REASONS FOR GRANTING THE WRIT

Structural error occurs when a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, and when it fails to make specific findings regarding the death-eligibility of a defendant. The Florida Supreme Court's decision to affirm Mr. Jackson's death sentence undermines multiple federal constitutional rights. Finally, the present case presents an ideal vehicle for this Court to delimitate the contours of the Sixth Amendment regarding the minimum findings a jury must make in order to find a defendant death- eligible.

I. THE FLORIDA SUPREME COURT'S DECISION UNDERMINES MULTIPLE FEDERAL CONSTITUTIONAL RIGHTS AND CONFLICTS WITH BINDING PRECEDENT OF THIS COURT

A. THE SIXTH AMENDMENT RIGHT THAT THE JURY, NOT THE JUDGE, FIND ALL ELEMENTS NECESSARY TO MAKE A DEFENDANT DEATH-ELIGIBLE

Jackson argues that the constitutional principles, that Florida has interpreted in its *Poole* decision, had been properly applied to his case, Jackson's death sentence would be found unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. The Florida Supreme Court and the trial court summarily denied his claims and failed to give him the individualized consideration his case merits. The Sixth Amendment requirement that the jury, not the judge, must find all aggravators necessary to make a defendant death-eligible is applicable to Mr. Jackson's case.

i. LEGAL BACKGROUND APPLICABLE TO 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, this Court considered the constitutionality of the Florida death penalty statutory framework in light of *Ring* in *Hurst v. Florida*. This 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 this 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 Florida Supreme 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 Florida Supreme Court's "longstanding precedent interpreting *Ring v. Arizona* . . . ." *Id.* at 508.[10]

Against this background, Jackson argues that without a clear unanimous finding by the jury, during his guilt or sentencing phase, of the elements that made him eligible for the death penalty, he is entitled to a resentencing.

B. POOLE'S CONSTITUTIONAL LEGAL PRINCIPLES SHOULD APPLY TO JACKSON'S UNDER FEDERAL LAW PRINCIPLES

Jackson submits that federal law principles require application of *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. In cases

[10] The Florida Supreme 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.

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.").

This Court in *Teague* recognized two categories of rules that are not subject to the general bar against retroactivity. *Teague v. Lane*, 489 U.S. 288, 311-12 (1989). 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 no different from the retroactivity analysis use in *Montgomery* to apply the holding in *Miller v. Alabama*, 567 U.S. 460 (2012) to 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 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. 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, this 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, this 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 juveniles "whose crimes reflect irreparable corruption" could receive a life without parole sentence. *Id*. at 734.

This 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). This 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, "'necessarily 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.

The logic supporting *Poole*'s retroactivity is not undermined by *Summerlin*. In *Summerlin*, this 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).

II. JACKSON'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE HE DID NOT HAVE A JURY TRIAL ON THE FACTS THAT MADE HIM ELIGIBLE FOR A DEATH SENTENCE

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 unanimous jury finding of at least one aggravator beyond a reasonable doubt before making a defendant eligible for the death penalty.

To date, 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. 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. Jackson's jury identified no aggravating factors.[11] *Id*. Rather, the trial court alone made the findings as to the aggravating and mitigating circumstances applicable to his case. In other words, the trial court alone determined 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, Jackson's death sentence is unconstitutional under the Sixth Amendment.

A. NO CONTEMPORANEOUS FELONY AGGRAVATORS WERE FOUND AT THE GUILT-PHASE

In *Poole*, the Florida Supreme Court upheld Poole's conviction because the jury had unanimously found that, during the murder, 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 Florida Supreme Court concluded that under the correct understanding of *Hurst v. Florida*, 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 Poole's case, no contemporaneous conviction that could serve as a felony

[11] 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.

aggravator exists in Jackson's case. Although Jackson's jury was *incorrectly* instructed on both premeditated and felony murder theories during the guilt phase of his trial, *see* TR. I:8 and led to believe by the State that 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, 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 postconviction, Jackson challenged the propriety of his indictment because the elements of felony murder were never part of it. Additionally, 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. Jackson's claims were summarily denied. The Florida Supreme Court "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). 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.

In this case, the state failed to allege or inform as to any aggravating factors in the

Indictment. Therefore, to allow the government to proceed to seek an enhanced sentence of death based on aggravating factors not alleged in the Indictment would be in violation of the Sixth Amendment as mandated by the United States Supreme Court in *Ring*, *Apprendi*, *Alleyne*,[12] and *Hurst*. An Indictment "should set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Carll*, 105 U.S. 611, 612-13 (1881). A fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the [g]overnment beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). "If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,]…the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime." *Apprendi v. New Jersey*, 530 U.S. 466, 501 (2000) (Thomas, J., concurring).

Apprendi held that any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an Indictment, submitted to a jury, and proven beyond a reasonable doubt. *See also Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). It is also axiomatic that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (quoting *United State v. Gaudin*, 515 U.S. 506, 510 (1995)). "'[F]acts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 570 U.S. 99 (2013) (quoting

[12] *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

Apprendi, 530 U.S. at 490).

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law," and the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *Accord* Art. I, §§ 9, 22, Fla. Const. Taken together, the United States Supreme Court has made clear that these rights entitle a criminal defendant to "a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970); accord *Galindez v. State*, 955 So. 2 517, 519 (Fla. 2007). The point of contention over the years has been the extent to which a State can define facts as "sentencing considerations" rather than elements, thereby allowing such facts to be determined by judges rather than juries. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Almendarez-Torrez v. United States*, 523 U.S. 224 (1998).

Imposition of capital punishment where the charging document fails to charge the commission of a capital crime and fails to adequately identify the essential elements of the crime to be punished denies notice, violates Due Process, and fails to accommodate the fundamental right to Grand Jury indictment under the Fifth and Fourteenth Amendments to the United States Constitution. Imposition of capital punishment where the charging document wholly fails to charge a capital crime and fails to provide adequate notice and a meaningful opportunity to defend against the sentence is arbitrary, capricious and leads to the unreliable imposition of capital punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United

States Constitution.

Based on the indictment, prosecution, and verdict in this case, we must conclude that the jury could have only found Jackson guilty of first-degree murder based on a premeditated murder theory. By itself, a 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 Jackson's trial, the jury found no *contemporaneous conviction* that could have served as a felony aggravator that made Jackson eligible for the death penalty.

B. THE AGGRAVATING FACTORS FOUND DURING THE SENTENCING PHASE BY THE JUDGE DO NOT IMPEDE THE APPLICATION OF THE CONSTITUTIONAL PRINCIPLES INTERPRETED IN POOLE TO 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 Jackson's case. Based on *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998)[13], this Court in *Apprendi* recognized a 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."

---

[13] In *Almendarez-Torres*, this Court dealt with the issue of whether prior convictions not charged in an indictment could be used as penalty enhancers. This 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.

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 this Court has criticized its own decision and has 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 *Almandarez-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 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.

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. 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 Jackson was properly found to be death-eligible. Consequently, the limited role of the jury during Jackson's penalty phase cannot be considered harmless.

One of the foundational precepts of the Eighth Amendment, that death is different, requires unanimity in any death recommendation. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187–88 (1976) (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."). This is to ensure that the death penalty is not being arbitrarily or capriciously imposed, but properly tailored to the most aggravated and least mitigated of murders. "If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." *Hurst v. State*, 202 So. 2d at 60.

Like most states which have retained the death penalty, federal law requires the jury's verdict in a capital case to be unanimous. *See* 18 U.S.C. § 3593(e); Fed. R. Crim. P. 31(a). This Court reiterated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (abrogated on other grounds in *Atkins*, 536 U.S. at 321)). Thus, the vast majority of capital sentencing laws provide clear and reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated and found *all* of the requisite findings of fact. As a result, the Florida Supreme Court held that the Eighth Amendment and Florida's right to trial by jury, requires jury unanimity in all death cases. *Hurst v. State*, 202 So. 3d at 61.

The error occurred in Jackson's case when the jury returned none of the required findings of facts at all – let alone unanimously – and when the jury failed to return a unanimous death recommendation. Further, as noted previously, errors were made in Jackson's sentencing, specifically, when the trial court considered an aggravating factor that was not supported by the evidence. This is error. Under the Sixth Amendment, Jackson was entitled to have a jury, not a judge, weigh and evaluate the aggravators against the mitigation. This failure deprived Jackson of the proper individualized sentencing required by the Constitution. Jackson's jury returned an advisory recommendation of death by a vote of seven-to-five, a bare majority and far from unanimous. This is does not satisfy the Eighth Amendment and his death sentence cannot stand.

III. 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 Jackson without a proper finding that he was eligible for the death penalty is arbitrary under the Eighth Amendment to the United States Constitution. 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.").

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 Jackson's case, no aggravating circumstance was found unanimously by the jury. Without such a finding, Jackson's maximum penalty is life in prison. Fla. Stat. § 775.082(1). Consequently, the trial court's imposition of the death penalty to Jackson is arbitrary under the Eighth Amendment because it exceeds the permitted maximum statutory sentence.

This conclusion is not controverted by the holding in *Poole*, stating that Florida's capital statutory scheme comports with the Eighth Amendment 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), this 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. This 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 Jackson.

In *Spaziano*, this 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, this 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). This 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, this 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 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. 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

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). 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 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

For the foregoing reasons, Jackson respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

/s/ ***Julissa R. Fontan***
JULISSA R. FONTAN
FLORIDA BAR NO. 0032744
ASSISTANT CCRC
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE REGION 12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
TELEPHONE: (813) 558-1600
COUNSEL FOR PETITIONER

MAY 31, 2022