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

---

APPENDIX

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****COUNSEL OF RECORD***

INDEX TO APPENDICES

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ETHERIA VERDELL JACKSON,

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APPENDIX A

Florida Supreme Court Opinion

Supreme Court of Florida

No. SC21-754

ETHERIA VERDELL JACKSON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

January 20, 2022

PER CURIAM.

We have for review Etheria Verdell Jackson's appeal of the circuit court's order summarily denying his successive motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.851.[1] In that motion, Jackson argues that he is entitled to retroactive application of our decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), which receded from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), except as to the requirement that "a jury must unanimously find the existence of a statutory aggravating

1. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

circumstance beyond a reasonable doubt." *Poole*, 297 So. 3d at 491.

After carefully reviewing Jackson's arguments, we conclude that he is not entitled to relief. Jackson was convicted of first-degree murder and sentenced to death in accordance with the jury's seven-to-five vote recommendation. *Jackson v. State*, 530 So. 2d 269, 271 (Fla. 1988). His death sentence became final in 1989. *Jackson v. Florida*, 488 U.S. 1050 (1989) (denying petition for certiorari). Because his death sentence was final prior to *Ring v. Arizona*, 536 U.S. 584 (2002), *Poole* does not apply retroactively to him. *See Randolph v. State*, 320 So. 3d 629, 631 (Fla. 2021); *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016).[2] We also summarily reject Jackson's claims that he is entitled to relief under either the Eighth Amendment or the Fourteenth Amendment.

---

2. We further conclude that Jackson's Sixth Amendment claim is procedurally barred. In his prior successive postconviction motion, Jackson raised essentially the same arguments advanced in his current motion. *See Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014) ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion."); *see also* Fla. R. Crim P. 3.851(e)(2).

Accordingly, because none of Jackson's claims warrant relief, we affirm the challenged order.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,
Tatiana R. Salvador, Judge
Case No. 161985CF012620AXXXMA

Eric Pinkard, Capital Collateral Regional Counsel, Natalia C. Reyna-Pimiento, Julissa R. Fontán, and Heather A. Forgét, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

Ashley Moody, Attorney General, and Janine D. Robinson, Assistant Attorney General, Tallahassee, Florida,

for Appellee

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

---

APPENDIX B

Trial Court Order

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-1985-CF-12620-AXXX-MA
DIVISION: CR-E

STATE OF FLORIDA

v.

ETHERIA VERDEL JACKSON,
Defendant.
_____/

ORDER DISMISSING DEFENDANT'S SUCCESSIVE MOTION TO VACATE SENTENCE

This matter came before this Court on Defendant's Successive Motion to Vacate Sentence, filed January 25, 2021. The State timely filed its Answer on February 10, 2021. This Court conducted the case management conference required by Florida Rule of Criminal Procedure 3.851(f)(5)(B) on March 3, 2021. At the case management conference, this Court determined that the Successive Motion raises only purely legal issues and that an evidentiary hearing, therefore, would not be necessary. This Court has considered the Successive Motion, the State's Answer, argument of counsel, the record in this cause, and the relevant authority, and finds and rules as follows.

A rule 3.851 motion must be filed within one year of the conviction and sentence of death becoming final. Fla. R. Crim. P. 3.851(d)(1). A rule 3.851 motion may be considered beyond the one-year time-bar, however, if it alleges that "the fundamental constitutional right asserted was not established within the [one-year] period provided for in subsection (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

Even if found to be timely, a successive rule 3.851 motion may be denied without an evidentiary hearing if the record conclusively shows the defendant is not entitled to relief. Gaskin v. State, 218 So. 3d 399, 400 (Fla. 2017) (citing Reed v. State, 116 So. 3d 260, 264 (Fla. 2013)). "Under rule 3.851, 'postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record.'" Carroll v. State, 114 So. 3d 883, 885-86 (Fla. 2013) (quoting Marek v. State, 8 So. 3d 1123, 1127 (Fla. 2009)).

A jury convicted Defendant of first-degree murder and, by a vote of 7 to 5, voted for the death sentence, which the Court imposed. Jackson v. State, 530 So. 2d 269, 271 (Fla. 1988). The Florida Supreme Court affirmed the judgment and sentence of death in a Mandate issued on September 1, 1988. Id. On September 5, 1990, Defendant filed a Florida Rule of Criminal Procedure 3.850 motion, which the Court denied on the merits. Jackson v. Dugger, 633 So. 2d 1051, 1053 (Fla. 1993). In a Mandate issued on January 13, 1994, the Florida Supreme Court affirmed the denial of Defendant's rule 3.850 motion. Id.

Subsequently, Defendant filed a successive motion for postconviction relief on January 20, 2017, which sought retroactive application of Hurst v. Florida, 577 U.S. 92 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016) to his case. The Court denied that motion by Order rendered on February 14, 2017. (Ex. "A"). The Florida Supreme Court affirmed the denial by Mandate issued on February 27, 2018. (Ex. "B").

Defendant's conviction and sentence of death became final on January 23, 1989, when the United States Supreme Court denied Defendant's petition for writ of certiorari on direct appeal. See Fla. R. Crim. P. 3.851(d)(1)(B) (stating, for purposes of rule 3.851, that a sentence of death becomes final under subsection (d)(1)(B) "on the disposition of the petition for writ of certiorari

by the United States Supreme Court, if filed."); Jackson v. Florida, 488 U.S. 1050 (1989). Thus, any postconviction claim asserted more than a year after Defendant's conviction and sentence of death became final must be dismissed unless the claim falls within the newly-recognized retroactive constitutional right exception in subsection (d)(2)(B). Fla. R. Crim. P. 3.851(e)(2); see also Carroll, 114 So. 3d at 886 ("Rule 3.851 requires . . . that motions for postconviction relief must be filed within one year from when the conviction and sentence become final unless the claim is based on . . . a newly recognized fundamental constitutional right that has been held to apply retroactively.").

In Hurst v. Florida, the Supreme Court concluded Florida's capital sentencing scheme was unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). The Court explained, "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 577 U.S. at 95.

Upon remand, the Florida Supreme Court held in Hurst v. State, "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." Hurst, 202 So. 3d at 53. The Court further held the jury's findings and recommendation of death must be unanimous. Id. at 54.

In the instant Successive Motion, Defendant claims entitlement to relief from his death sentence based on State v. Poole, 297 So. 3d 487 (Fla. 2020), cert. denied, --- U.S. ---, 2021 WL 78099 (Mem) (Jan. 11, 2021). In Poole, the Court receded from Hurst and held that: (1) a jury need only find the existence of one or more statutory aggravating circumstances, and need not find that the aggravating circumstances are "sufficient"; (2) the decision whether to impose a sentence

of death is not an "element" which must be submitted to a jury; and (3) the Sixth Amendment right to jury trial does not require that a jury's recommendation of death be unanimous. Poole, 297 So. 3d at 502-504. Defendant asserts that "Poole's clarification [of Hurst] provides the grounds for" his claims in the instant Successive Motion. (Mot. at 6). Defendant does not address the rule's requirement that the newly-established fundamental constitutional right must have been held to apply retroactively, but urges retroactive application of Poole, making no arguments in support of retroactive application of Hurst that he did not make in his 2017 successive motion.

This Court noted in its February 14, 2017 Order denying Defendant's previous successive motion for postconviction relief:

> In Asay v. State, [210 So. 3d 1] (Fla. [] 2016), the Florida Supreme Court addressed whether Hurst v. Florida and Hurst should apply retroactively. The majority employed the traditional Witt v. State, 387 So. 2d 922 (Fla. 1980) retroactivity framework to conclude that Hurst v. Florida and Hurst do not apply retroactively to capital cases that became final prior to June 24, 2002, the date on which Ring was decided. Id. at [22].
>
> The Florida Supreme Court considered whether Hurst v. Florida and Hurst should apply retroactively to post-Ring capital cases in Mosley v. State, [209 So. 3d 1248] (Fla.[]2016). In Mosley, the Court employed the Witt retroactivity framework as well as the fundamental fairness retroactivity analysis set forth in James v. State, 615 So. 2d 688 (Fla. 1993). Id. at [1273-75]. The Court held that, "because [the defendant] raised a Ring claim at his first opportunity and was then rejected at every turn, . . . fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to [the defendant]." Id. at [1275]. The Court further found the Witt framework also supported the retroactive application of Hurst v. Florida and Hurst to post-Ring cases. See id. at [1276-83].
>
> In Gaskin v. State, [218 So. 3d 399] (Fla. []2017), the Florida Supreme Court made clear that the fundamental fairness retroactivity analysis only applies to post-Ring cases. In that case, the defendant had argued, both at trial and on direct appeal, that Florida's capital sentencing scheme was facially unconstitutional "for the reasons espoused by the United States Supreme Court in Ring and Hurst v. Florida . . . ." Id. at [402] (Pariente, J., concurring in part and dissenting in part) (footnote omitted). In spite of the defendant's repeated constitutional assaults on Florida's capital sentencing scheme based on the reasoning subsequently established in Ring, the defendant was not entitled to retroactive relief under Hurst v. Florida because the defendant's sentence of death became final pre-Ring. Id. at [401] (citing Asay, [210 So. 3d at 29-30]).

> Taken together, the Asay/Mosley/Gaskin triad creates a categorical bar against the retroactive application of Hurst v. Florida and Hurst to capital cases that became final before Ring was decided. Therefore, Defendant's belated Hurst claims do not fall within the newly-established retroactive constitutional right exception in [rule 3.851](d)(2)(B) because the right has not been held to apply retroactively to capital cases that became final before Ring was issued.

(Ex. "A" at 3-5). In affirming that Order, the Florida Supreme Court cited Hitchcock v. State, 226 So. 3d 216 (Fla. 2017). Jackson v. State, 237 So. 3d 905, 906 (Fla. 2018). Defendant's arguments in favor of retroactive application of the Hurst cases find support, and are eloquently set forth, in Justice Lewis' opinion concurring in result in Hitchcock, but that position has not been adopted by a majority of the court. Instead, the Hitchcock majority confirmed that the court has "consistently applied our decision in Asay, denying the retroactive application of Hurst v. Florida as interpreted in Hurst v. State to defendants whose death sentences were final when the Supreme Court decided Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)." Hitchcock, 226 So. 3d at 217.

Of the three jury findings required under Hurst, only one survived Poole. Poole's "clarification" of Hurst did not expand Hurst and did not establish a fundamental constitutional right, but curtailed constitutional rights previously recognized under Hurst. Moreover, Poole has not been held by an appellate court to have retroactive application. As such, the instant Successive Motion fails to meet the time limitation exception of rule 3.851(d)(2)(B). "A claim raised in a successive motion shall be dismissed . . . if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivisions (d)(2)(A), (d)(2)(B), or (d)(2)(C)." Fla. R. Crim. P. 3.851(e)(2).

Accordingly, it is

ORDERED that Defendant's Successive Motion to Vacate Sentence, filed through counsel on January 25, 2021, is hereby **DISMISSED**. This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 24th day of March, 2021.

T. Salvador

TATIANA R. SALVADOR
Circuit Court Judge

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CERTIFICATE OF SERVICE

I do certify that a copy of the foregoing has been furnished to all legal counsel for both parties via address listed above and/or to Defendant by U.S. Mail this 29 day of March, 2021.

Tanya Berlin
_____,
Deputy Clerk.

Case No.: 16-1985-CF-12620-AXXX-MA
Attachments: Exhibits A-B
TRS/bw

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-1985-CF-12620-AXXX

DIVISION: CR-C

STATE OF FLORIDA

v.

ETHERIA VERDELL JACKSON,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE POSTCONVICTION MOTION TO VACATE SENTENCE OF DEATH

This cause comes before this Court on Defendant's "Successive Motion to Vacate Death Sentence," filed through counsel on January 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.851.

A jury convicted Defendant of first-degree murder and, by a vote of 7 to 5, voted for the death sentence, which the Court imposed. Jackson v. State, 530 So. 2d 269, 271 (Fla. 1988). The Florida Supreme Court affirmed the judgment and sentence of death in a Mandate issued on September 1, 1988. Id. On September 5, 1990, Defendant filed a Florida Rule of Criminal Procedure 3.850 motion, which the Court denied on the merits. Jackson v. Dugger, 633 So. 2d 1051, 1053 (Fla. 1993). In a Mandate issued on January 13, 1994, the Florida Supreme Court affirmed the Court's denial of Defendant's rule 3.850 motion. Id.

A rule 3.851 motion must be filed within one year of the conviction and sentence of death becoming final. Fla. R. Crim. P. 3.851(d)(1). A rule 3.851 motion may be considered beyond the one-year time-bar, however, if it alleges that "the fundamental constitutional right asserted

EXHIBIT "A"

was not established within the [one-year] period provided for in subsection (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

Even if found to be timely, a successive rule 3.851 motion may be denied without an evidentiary hearing if the record conclusively shows the defendant is not entitled to relief. Gaskin v. State, SC15-1884, 2017 WL 224772, at *1 (Fla. Jan. 19, 2017) (citing Reed v. State, 116 So. 3d 260, 264 (Fla. 2013)). "Under rule 3.851, 'postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record.'" Carroll v. State, 114 So. 3d 883, 885-86 (Fla. 2013) (quoting Marek v. State, 8 So. 3d 1123, 1127 (Fla. 2009)).

Defendant's convictions and sentence of death became final on January 23, 1989, when the United States Supreme Court denied Defendant's petition for writ of certiorari on direct appeal. See Fla. R. Crim. P. 3.851(d)(1)(B) (stating, for purposes of rule 3.851, that a sentence of death becomes final under subsection (d)(1)(B) "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."); Jackson v. Florida, 488 U.S. 1050 (1989). Thus, any postconviction claim asserted more than a year after Defendant's convictions and sentence of death became final must be denied unless the claim falls within the newly-recognized retroactive constitutional right exception in subsection (d)(2)(B). Carroll, 114 So. 3d at 886 ("Rule 3.851 requires . . . that motions for postconviction relief must be filed within one year from when the conviction and sentence become final unless the claim is based on . . . a newly recognized fundamental constitutional right that has been held to apply retroactively.").

ANALYSIS OF *HURST* CLAIM

Defendant contends he was sentenced to death unconstitutionally, and that his sentence of death must be vacated, pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), which held Florida's

capital sentencing scheme unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002), because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[1] Hurst v. Florida, 136 S. Ct. at 619. Defendant alleges he is entitled to retroactive relief under Hurst v. Florida because Defendant properly asserted, presented, and preserved challenges to the lack of jury fact finding and unanimity.

The United States Supreme Court, in Hurst v. Florida, held the Sixth Amendment mandates that each fact necessary to impose a greater punishment than authorized by the jury's guilty verdict, such as a sentence of death, must be submitted to and found by the jury. Id. at 621-22. On remand, the Florida Supreme Court concluded "Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury" and that "the jury's recommended sentence of death must be unanimous." Hurst v. State ("Hurst"), 202 So. 3d 40, 44 (Fla. 2016). It further clarified the meaning of Hurst v. Florida by proclaiming: "[I]n addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." Id. at 54.

In Asay v. State, No. SC16-223, 2016 WL 7406538 (Fla. Dec. 22, 2016), the Florida Supreme Court addressed whether Hurst v. Florida and Hurst should apply retroactively. The majority employed the traditional Witt[2] retroactivity framework to conclude that Hurst v. Florida

[1] Defendant also asserts that all of his previous postconviction claims must be reheard and determined under the new constitutional framework provided in the Hurst decisions. Such a rehearing is not authorized by rule or law. See Fla. R. Crim. P. 3.851(d)(2)(B); Taylor v. State, 62 So. 3d 1101, 1111 (Fla. 2011) (citing Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992)) (holding that "trial counsel 'cannot be held ineffective for failing to anticipate the change in the law.'"). To the extent Defendant argues the Hurst opinions constitute newly discovered evidence, newly discovered evidence means facts, not law. See Fla. R. Crim. P. 3.851(d)(2)(A)&(B).

[2] Witt v. State, 387 So. 2d 922 (Fla. 1980).

and Hurst do not apply retroactively to capital cases that became final prior to June 24, 2002, the date on which Ring was decided. Id. at *13.

The Florida Supreme Court considered whether Hurst v. Florida and Hurst should apply retroactively to post-Ring capital cases in Mosley v. State, No. SC14-436, 2016 WL 7406506 (Fla. Dec. 22, 2016). In Mosley, the Court employed the Witt retroactivity framework as well as the fundamental fairness retroactivity analysis set forth in James v. State, 615 So. 2d 688 (Fla. 1993). Id. at *18-19. The Court held that, "because [the defendant] raised a Ring claim at his first opportunity and was then rejected at every turn, . . . fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to [the defendant]." Id. at *19. The Court further found the Witt framework also supported the retroactive application of Hurst v. Florida and Hurst to post-Ring cases. See id. at *19-25.

In Gaskin v. State, SC15-1884, 2017 WL 224772 (Fla. Jan. 19, 2017), the Florida Supreme Court made clear that the fundamental fairness retroactivity analysis only applies to post-Ring cases. In that case, the defendant had argued, both at trial and on direct appeal, that Florida's capital sentencing scheme was facially unconstitutional "for the reasons espoused by the United States Supreme Court in Ring and Hurst v. Florida . . . ." Id. at *3 (Pariente, J., concurring in part and dissenting in part) (footnote omitted). In spite of the defendant's repeated constitutional assaults on Florida's capital sentencing scheme based on the reasoning subsequently established in Ring, the defendant was not entitled to retroactive relief under Hurst v. Florida because the defendant's sentence of death became final pre-Ring. Id. at *2 (citing Asay, 2016 WL 7406538 at *13).

Taken together, the Asay/Mosley/Gaskin triad creates a categorical bar against the retroactive application of Hurst v. Florida and Hurst to capital cases that became final before

Ring was decided. Therefore, Defendant's belated Hurst claims do not fall within the newly-established retroactive constitutional right exception in subdivision (d)(2)(B) because the right has not been held to apply retroactively to capital cases that became final before Ring was issued. Accordingly, Defendant's claim is denied.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "Successive Motion to Vacate Death Sentence," filed through counsel on January 10, 2017, is **DENIED.** This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Jacksonville, Duval County, Florida on February 14, 2017.

RUSSELL HEALEY
Circuit Judge

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Etheria Verdel Jackson
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CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail on FEBRUARY 14TH, 2017.

Deputy Clerk

Case No.: 16-1985-CF-12620-AXXX
/act

Doc # 2018049620, OR BK 18300 Page 1627, Number Pages: 4,
Recorded 03/02/2018 08:47 AM, RONNIE FUSSELL CLERK CIRCUIT COURT DUVAL COUNTY

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MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Duval County, Florida

WHEREAS, in that certain cause filed in this Court styled:

ETHERIA VERDEL JACKSON vs. STATE OF FLORIDA

Case No.: **SC17-703**

Your Case No.: **161985CF012620AXXXMA**

CR-C

The attached opinion was rendered on: **01/24/2018**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS, The Honorable JORGE LABARGA, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 27th day of February 2018.

Clerk of the Supreme Court of Florida

FILED
FEB 27 2018
CLERK CIRCUIT COURT

EXHIBIT "B"

Supreme Court of Florida

No. SC17-703

ETHERIA VERDELL JACKSON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 24, 2018]

PER CURIAM.

We have for review Etheria Verdell Jackson's appeal of the circuit court's order denying Jackson's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Jackson's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court stayed Jackson's appeal pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017).

After this Court decided Hitchcock, Jackson responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Jackson's response to the order to show cause, as well as the State's arguments in reply, we conclude that Jackson is not entitled to relief. Jackson was sentenced to death following a jury's recommendation for death by a vote of seven to five. Jackson v. State, 530 So. 2d 269, 271 (Fla. 1988). His sentence of death became final in 1989. Jackson v. Florida, 488 U.S. 1050 (1989). Thus, Hurst does not apply retroactively to Jackson's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Jackson's motion.

The Court having carefully considered all arguments raised by Jackson, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.
PARIENTE, J., concurs in result with an opinion.
LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

An Appeal from the Circuit Court in and for Duval County,
Russell L. Healey, Judge - Case No. 161985CF012620AXXXMA

James Viggiano, Jr., Capital Collateral Regional Counsel, Maria E. DeLiberato, Julissa Fontán, and Chelsea Ray Shirley, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, Florida,

for Appellee

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

---

APPENDIX C

Motion for Rehearing and Order from the Florida Supreme Court denying motion for rehearing

Supreme Court of Florida

TUESDAY, MARCH 1, 2022

CASE NO.: SC21-754
Lower Tribunal No(s).:
161985CF012620AXXXMA

ETHERIA V. JACKSON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

JANINE D. ROBINSON
JULISSA FONTÁN
HEATHER A. FORGÉT
NATALIA C. REYNA-PIMIENTO
ALAN SETH MIZRAHI
HON. MARK H. MAHON, CHIEF JUDGE
HON. JODY PHILLIPS, CLERK
HON. TATIANA RADI SALVADOR, JUDGE

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SUPREME COURT OF FLORIDA

ETHERIA V. JACKSON,

Appellant.

v. **Case No. SC21-754**

STATE OF FLORIDA,

Appellee,
_____/

MOTION FOR REHEARING

Appellant, Etheria V. Jackson, respectfully moves for a rehearing of this Court's order dated January 20, 2022, affirming the denial of his successive motion for post-conviction relief under Rule 3.851 of the Florida Rules of Criminal Procedure. *See* Fla. R. App. P. 9.330(a)(2)(A). Mr. Jackson respectfully submits that in affirming the denial of post-conviction relief, the Court overlooked the subtle but existing difference between the nature of the claims in Mr. Jackson's 2017 post-conviction motion brought under *Hurst v. State* ("*Hurst* Motion"), and Mr. Jackson's 2020 post-conviction motion brought under *State v. Poole* ("*Poole* Motion").

I. *Hurst v. Florida* as interpreted by *State v. Poole*

The Court denied Mr. Jackson's appeal, and summarily rejected his Eighth and Fourteenth Amendments claims, finding that *Poole* does not

apply to Mr. Jackson's claim because his death sentence was final prior to *Ring v. Arizona*, 536 U.S. 584 (2002). Additionally, the Court rejected Mr. Jackson's Sixth Amendment claim finding it procedurally barred because it "essentially raised the same arguments" advanced in Mr. Jackson's previous *Hurst* Motion.

In rejecting the retroactive application of *Poole* to Mr. Jackson's case, the Court cites to *Randolph v. State*, 320 So. 3d 629, 631 (Fla. 2021), and *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016). Mr. Jackson does not dispute that as stated in *Randolph*, the Court has "consistently applied" *Asay* to deny claims requesting the "retroactive application of *Hurst v. Florida* [, 577 U.S. 92, 100 (2016)] **as interpreted in *Hurst v. State*** [, 202 So. 3d 40, 43 (Fla. 2016).]." 320 So. 3d at 631 (emphasis added). However, Mr. Jackson's current claims are different from those underlying the decisions in *Randolph* and *Asay* because Mr. Jackson has asked the Court to analyze the retroactive application of *Hurst v. Florida* as interpreted in *State v. Poole,* not *Hurst v. State*. Therefore, in denying his claim, the Court overlooked the specific nature of Mr. Jackson's claims.

A. Nature of Mr. Jackson's claims under *P*oole

In *Poole*, the Court curtailed some constitutional rights for criminal defendants previously recognized by its decision in *Hurst v. State*.

Specifically, the Court found that neither a jury finding on whether the aggravating circumstances together were "sufficient" to justify the imposition of the death penalty; nor a jury finding on whether those aggravating circumstances together outweigh the mitigation in the case, were necessary for the purpose of finding a criminal defendant eligible for death. *See* 202 So. 3d at 53–59. Despite curtailing those rights, the Court retained the need for a unanimous jury finding as to the existence of at least one aggravating circumstance in order to find a criminal defendant eligible for death. The Court further categorized this finding as the only element of the offense capable of increasing the penalty for first-degree murder from a life sentence to a death sentence. *See Poole*, 297 So. 3d at 505.

Although the Court did not address whether the unanimity requirement could be satisfied by a general unanimous jury recommendation of death, such clarification was not necessary because *Hurst v. Florida* explicitly cautioned against using an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury. *See Hurst,* 577 U.S. at 100 (stating that the State cannot treat an advisory recommendation by the jury as the necessary factual finding that *Ring* requires because "the jury's function under the Florida death penalty statute is advisory only"

(internal citation omitted)). It is against this background that Mr. Jackson argues that by categorizing the unanimous finding of an aggravator as the only element of the offense capable of making a defendant death eligible, this Court—in *Poole*—recognized, directly or indirectly, a right for criminal defendants to an explicit jury finding on the issue of eligibility. Because the jury in this case never made such a specific finding, Mr. Jackson argues that he was never eligible for the death penalty, and consequently, his sentence is illegal.

Mr. Jackson's jury recommended a sentence of death by a bare majority vote of seven-to-five. Mr. Jackson filed a proposed penalty phase verdict form during trial, which required the jury to state the specific aggravating circumstances found by a majority (the required number at the time) and beyond a reasonable doubt. TR IV:663-64. The trial court denied Mr. Jackson's request to present his proposed special verdict form to the jury. Throughout his case Mr. Jackson has argued that in absence of a special verdict form, there is no way for him, or the courts, to assess whether the jury found at least one aggravator and whether such an aggravator was found by a majority, much less unanimously, and beyond a reasonable doubt. In other words, the jury's recommendation of death in Mr. Jackson's case is insufficient to establish that Mr. Jackson was properly found eligible

for the death penalty as required under the Sixth Amendment right to a jury trial. Further, without a clear finding that Mr. Jackson was eligible for the death sentence, it is properly to argue that Mr. Jackson's death sentence is illegal and arbitrary under the Eighth Amendment, and his sentence and conviction, are both a violation of his due process rights and equal protection under the Florida and federal constitutions.

Thus, by denying Mr. Jackson's *Poole* Motion based on *Asay,* a case that addresses *Hurst v. Florida* as interpreted in *Hurst v. State*, rather than as interpreted in *Poole*, the Court overlooked addressing the main claim on Mr. Jackson's motion, that *Poole* reinforces or creates the need for a specific jury finding on the issue of eligibility.[1]

B. Procedural bar

This Court also found that Mr. Jackson's Sixth Amendment claim is procedurally barred because he had raised, here, essentially the same

[1] The legislative changes introduced to Florida's capital sentencing scheme after *Hurst v. Florida* was issued support Mr. Jackson's position. The new capital sentencing statute requires that to find somebody eligible for the death penalty, the jury must **not only** "determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6)", **but also** must "return findings identifying each aggravating factor found to exist. . . ." and such a finding "must be unanimous." In fact, the statute specifically provides that "If the jury: (1) Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death." Fla. Stat. § 921.141(2) (a) and (b) (2017).

arguments advanced in his prior *Hurst* Motion. The Court overlooks the specific focus of Mr. Jackson's *Poole* Motion.

Although Mr. Jackson's *Hurst* Motion and *Poole* Motion share similar characteristics because both discussed the application of *Hurst v. Florida* to the Florida's capital sentencing scheme at the time Mr. Jackson's was sentenced to death, the focus of the latest motion is on the need for a specific jury finding, a finding that permits a criminal defendant to identify both: (1) the aggravators found by the jury, and (2) whether the aggravators were found unanimously or not. In other words, Mr. Jackson's current appeal extends beyond his previous *Hurst* claims in that he argues that to define the contours of the Sixth Amendment right to a jury trial in the context of the Florida's death sentencing scheme, an explicit jury finding as to the existence of at least an aggravator and each juror's vote on the aggravator is fundamental to ensure a death sentence is constitutional.

Furthermore, even if Mr. Jackson's *Hurst* and *Poole* claims are substantially similar, Mr. Jackson's *Hurst* motion was denied without a decision on the 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. On this point, it is worth mentioning that this Court's opinion denying Mr. Jackson relief under his *Hurst* Motion was one amongst the first

of eighty virtually identical opinions released by this Court starting on January 22, 2018. No individual analysis as to the issues raised by Mr. Jackson's *Poole* Motion is found on that decision. Consequently, a procedural bar based on the fact that a substantially similar claim has already been raised and denied by this Court, it is not dispositive of Mr. Jackson's specific Sixth Amendment claim.

II. Applicability of *Poole* to Mr. Jackson's case based on the fundamental fairness doctrine.

Finally, and as stated above, Mr. Jackson acknowledges that the Court has consistently denied claims requesting the retroactive application of *Hurst* to pre-*Ring* cases based on *Asay*. However, *Asay* is not directly applicable to Mr. Jackson's case because it does not address the retroactive application of *Hurts v. Florida* as interpreted in *Poole,* nor does it address the application of the fundamental fairness doctrine as a valid retroactivity standard under the precedent of this Court. Thus, by applying *Asay* to affirm the trial court's ruling, this Court has omitted addressing the specific retroactivity argument raised by Mr. Jackson's *Poole* Motion, which is that, based on the procedural history of this case, Mr. Jackson is entitled to the retroactive application of *Poole* to his case based on fairness, rather than on the more traditional retroactivity standard laid out in *Witt v. State*, 387 So. 2d 922 (Fla. 1980) and used in *Asay*.

The fundamental fairness doctrine was established in *James v. State*, 615 So. 2d 668 (Fla. 1993), and validly used by this Court in the death penalty context in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). Under this doctrine, a criminal defendant who has raised a constitutional claim, which is rejected at that specific point in time, but it is later found to be legally sound, can abide himself of his preserved claim to obtain relief. *See James,* 615 So. at 669. The procedural history of this case shows that Mr. Jackson properly preserved the substance of his Sixth Amendment constitutional challenge to the role of the jury during the trial and post-trial processes. *Ring*, *Hurst*, and *Poole* later recognized the underlying principles of law in Mr. Jackson's preserved claims. However, Mr. Jackson was denied relief at that time, and he has been denied relief ever since.

By putting forward his fundamental fairness argument in his *Poole* Motion, Mr. Jackson calls the Court to decide whether it would be unfair to deprive him of the benefit of the Court's decision in *Poole*, which recognizes a constitutional right the defendant has argued for and preserved throughout the entirety of his criminal case. *See Mosley*, 209 So. 3d at 1275. In light of the procedural history of Mr. Jackson's case, and the still valid application of the fundamental fairness doctrine in similar cases, Mr. Jackson argues that the answer to this question is that he should be able to abide by the *Poole*

holding.

This Court undoubtedly plays a critical role in ensuring that the death penalty in Florida is administered in a fundamentally fair and balanced way. Mr. Jackson submits that to fulfill that important role, it is important that the Court provide Mr. Jackson with an opinion detailing the Court's findings, as to the specific facts and issues raised in his *Poole* Motion.

WHEREFORE Mr. Jackson respectfully requests that the Court grant a rehearing on his appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing 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) and (capapp@myfloridalegal.com), on February 3rd, 2022.

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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