IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

SC20-257

MICHAEL JAMES JACKSON,

Respondent.
_____/

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

RESPONSE TO EMERGENCY ALL WRITS PETITION AND PETITION FOR WRIT OF PROHIBITION

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REQUEST FOR ORAL ARGUMENT

The State's Emergency All Writs Petition and Petition for Writ of Prohibition (hereinafter "Petition") and subsequent Motion for Stay halted a capital trial that was scheduled to start on February 24, 2020. The State seeks to reinstate a death sentence vacated nearly three years ago – premising its arguments on tenuous legal theories with sweeping implications. The issues raised in the State's Petition and Mr. Jackson's Response involve important rights protected by the Florida and Federal constitutions, and include issues of retroactivity, finality and stability of the law, equal protection, arbitrary imposition of the death penalty, and the jurisdictional role of the courts. The determination of these issues will affect not just Mr. Jackson, but also those capital defendants who have been granted new penalty phase trials across the State of Florida in light of *Hurst*,[1] but who have not yet been given their penalty phase retrials. Mr. Jackson respectfully requests oral argument to be heard in response to the State's Petition.[2]

PRELIMINARY STATEMENT

The State's Emergency All Writs Petition and Petition for Writ of Prohibition (hereinafter "Petition") and subsequent Motion for Stay halted a capital trial that was scheduled to start on February 24, 2020. The State seeks to reinstate a death sentence

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[2] On April 2, 2020, this Court *sua sponte* set this case for Oral Argument on June 2, 2020.

vacated nearly three years ago – premising its arguments on tenuous legal theories with sweeping implications. The issues raised in the State's Petition and Mr. Jackson's Response involve important rights protected by the Florida and Federal constitutions, and include issues of retroactivity, finality and stability of the law, equal protection, arbitrary imposition of the death penalty, and the jurisdictional role of the courts.

The State's Petition is a thinly veiled attempt at a belated appeal -- 970 days after Mr. Jackson's two 8-4 advisory death recommendations were vacated. The State does not possess the right to a belated appeal under any equitable, statutory, or legal authority. But for Hurricane Dorian, which forced the closure of the Duval County courts and caused Mr. Jackson's September 2019 penalty phase trial to be postponed at the last minute, his resentencing would already be complete.

Despite the State's arguments to the contrary, this Court's ultimate jurisdiction over death penalty cases is not in jeopardy. Granting the Petition would not only be a violation of Mr. Jackson's due process, equal protection, Sixth Amendment, and Eighth Amendment rights, but would also result in this Court ignoring or reversing decades-long precedent regarding finality of judgments and affirmative waivers of appellate remedies. The effect would be to destabilize Florida's entire judicial system. This Court should deny the Petition and remand Mr. Jackson's case to the circuit court to conduct his previously scheduled penalty phase trial.

FACTS AND PROCEDURAL HISTORY

Mr. Jackson, along with co-defendants Bruce Nixon, Tiffany Cole, and Alan Wade, was indicted on August 18, 2005 and charged with two counts of first-degree murder, two counts of armed robbery, and two counts of kidnapping. Mr. Jackson was convicted as charged after a jury trial in May of 2007.

Prior to the penalty phase, Mr. Jackson filed a motion requesting that the jury be required to determine which aggravating circumstances existed and that the jury be required to recommend a sentence of death by unanimous vote, rather than a mere majority. The motion argued that the absence of such requirements would violate Mr. Jackson's Sixth and Eighth Amendment rights, citing *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Jackson also moved the trial court for an "interrogatory" verdict form that would reflect the jury's vote as to each individual aggravating and mitigating circumstance. He requested that the jury be provided with a list of all statutory aggravating and mitigating circumstances including the burden of proof required for each. He also asked that the jurors be given room on the verdict form to record any non-statutory mitigating circumstances on which they relied in making a recommendation, and by what vote they did so. The trial court denied all of these requests. (TR ROA Vol. 8, 1630-31).

Mr. Jackson waived the presentation of mitigating evidence, but his counsel argued based on guilt-phase evidence that Mr. Jackson's role in the offense was less

significant than that of his co-defendants in multiple respects. (TR ROA Vol. 8, 1668-73).

Counsel also proffered to the trial court evidence they had collected to present in the penalty phase, including mental health records and testimony by Jackson's grandmother and family friend indicating that Jackson was born to a mother who used cocaine and heroin while pregnant and then tried to sell him at a trailer park for drugs just a few days after Jackson's birth; that he subsequently had no contact with his biological father or his mother, and was instead raised by his grandparents; that his biological mother was arrested for fraud around the time Jackson was born; that there was a family history of bipolar disorder; that growing up without a mother and father impacted Jackson significantly; that he exhibited no signs of violent behavior prior to the current offense and was kind hearted and good to his grandparents; and that he had always been a follower not a leader, and was easily influenced by others. (TR ROA, Vol. 8, 1616-21).

The jury was instructed to make advisory sentencing recommendations as to each murder. After a three-hour deliberation, the jury recommended death for each murder by a vote of 8-4.

After conducting a hearing under *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), the judge made factual findings as to the following aggravating circumstances as to both murder counts: (1) Jackson had previously been convicted

of a felony and was on probation at the time of the murders; (2) Jackson had previously been convicted of another capital felony—the contemporaneous murder of the other victim; (4) the murder was committed in the course of a kidnapping; (3) the murder was especially heinous, atrocious, or cruel; (5) the murder was cold, calculated, and premediated; (6) the murder was committed for financial gain; (7) the murder was committed to avoid arrest; and (8) the victim was especially vulnerable due to age or disability. *Jackson v. State,* 18 So. 3d 1016, 1024 (Fla. 2009).

The judge found one statutory mitigating circumstance as to both murder counts: Jackson was 23 at the time of the crimes (some weight). The court found three non-statutory mitigating circumstances: (1) Jackson was amenable to rehabilitation and a productive life in prison (some weight); (2) Jackson's mother was a substance abuser and his parents abandoned him to be raised by his grandmother (some weight); and (3) Jackson's prior criminal record, although extensive, contained no acts of violence (some weight). *Id.* The court, not the jury, made findings of fact regarding the applicable aggravating circumstances, and whether sufficient aggravating circumstances existed to outweigh the mitigating circumstances.

This Court affirmed the convictions and sentences. *Jackson v. State,* 18 So. 3d 1016 (Fla. 2009). Mr. Jackson timely filed a motion for post-conviction relief.

After an evidentiary hearing, the circuit court denied relief and this Court affirmed the denial. *Jackson v. State,* 127 So. 3d 447 (Fla. 2013).

On November 27, 2013, Mr. Jackson timely filed a 28 U.S.C. § 2254 petition in the United States District Court for the Middle District of Florida. *Jackson v. Sec'y, Fla. Dept. of Corrections,* No. 3:13-cv-1463-J-32PDB (M.D. Fla. Nov. 27, 2013). While his federal habeas proceedings were pending, Mr. Jackson sought and obtained *Hurst* relief in the circuit court, which entered its order on June 9, 2017. The State did not appeal the grant of his new penalty phase. Mr. Jackson's federal habeas proceedings are currently stayed pending the result of his new penalty phase. A status report is due June 1, 2020.

SUMMARY OF ARGUMENT

The State's radical Petition asks the Court to undermine some of the primary foundations supporting Florida's justice system.

Granting this Petition and endorsing any of the three alternative remedies sought by the State would be an improper exercise of this Court's prohibition and all writs jurisdiction, as derived from Article V, Section 3 of the Florida Constitution and delimited by longstanding Florida jurisprudence. (Argument I).

The State's Petition asks this Court to abandon appellate norms to retroactively apply this Court's decision in *State v. Poole*, --- So.3d ---, 2020 WL370302 (Fla. Jan. 23, 2020), by inventing jurisdiction where none exists. The State waived its rights to

the remedies it now seeks when it affirmatively elected not to challenge the grant of Mr. Jackson's new penalty phase. The order granting Mr. Jackson a new penalty phase trial is long since final, and there is no statutory, equitable, or legal mechanism upon which the State can legitimately rely to belatedly ask this Court to reverse a years-old, unappealed circuit court order. (Argument II).

Moreover, the decision in *Poole* and applying *Poole to Mr. Jackson is* contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. (Arguments III, IV).

The State's Petition contravenes basic tenets of waiver and finality of judgments, as well as the long-respected precedent and Rules of this Court. In order to safeguard the legal structure that ensures equal and uniform justice to all that come before the Court, the Petition should be denied.

ARGUMENT I

The State's Petition Calls for an Improper Exercise of this Court's All Writs Jurisdiction.

1. The State's Petition is not an appropriate vehicle for the exercise of this Court's All Writs Jurisdiction.

The State urges this Court to exercise its All Writs Jurisdiction because

> the lower court's interpretation of *Simmons* [*v. State*, 274 So.3d 468 (Fla. 1st DCA 2019] forecloses the ability of trial courts to follow this Court's decision in *Poole*; consequently, the First District's decision in *Simmons* impermissibly threatens the exercise of this Court's 'ultimate jurisdiction' over this and other cases where trial

> courts granted *Hurst v. State* relief but did not conduct resentencing before this Court announced its decision in *Poole*.

(Petition, p. 8).

The State's argument must fail, as this Court's ultimate jurisdiction is not at risk. This Court undeniably has exclusive and plenary appellate jurisdiction over all appeals in cases where the death penalty has been imposed. But that is not the case currently presented.

To attempt to demonstrate the perceived threat to this Court's jurisdiction, the State's Petition constructs a house of cards. The State argues that because the First District Court of Appeal misapplied "the concept of procedural jurisdiction," the *Simmons* decision "impermissibly interferes with this Court's constitutionally mandated jurisdiction over death penalty cases by precluding the trial court from implementing this Court's change [sic] decisional law." (Petition, p. 12).

There is no such decisional law. The *Poole* decision did not purport to retroactively resurrect jurisdiction in trial courts where orders vacating death sentences had long been final and where, as here, the State affirmatively failed to seek, and thus waived, any appellate remedy.

Nor did *Poole* purport to announce a new rule that would govern future trials. On the contrary this Court clearly acknowledged "that the Legislature has changed our state's capital sentencing law in response to *Hurst v. State*. Our decision today is

not a comment on the merits of those changes or on whether they should be retained." *Poole*, --- So.3d ---, 2020 WL370302 at *15 (Fla. Jan. 23, 2020).

In reality, the State's Petition impermissibly seeks to expand this Court's Article V, Section 3 jurisdiction by inviting this Court to actually impose a death sentence instead of having that duty performed by a jury and circuit court judge as required by Florida law. The State is not seeking to protect this Court's duty to conduct appellate review but instead inviting it to usurp sentencing power.

If, after his new penalty phase trial, Mr. Jackson receives another death sentence, then this Court's Article V, section 3(b)(1) jurisdiction will be invoked and this Court will be called upon to exercise its proper role in the administration of the death penalty in this state by conducting a complete review of the positions advanced by both sides. Nothing about the commencement of Mr. Jackson's new penalty phase would prevent this Court from exercising that jurisdiction.

2. The writ of prohibition is inapplicable here.

"The State alternatively petitions this Court for a writ of prohibition that would prevent the trial court from conducting any resentencing[.]" (Petition, p. 2). But this Court has repeatedly explained that prohibition is "an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction." *Mandico v. Taos Construction, Inc.,* 605 So. 2d 850, 853-54 (Fla. 1992); *see also Southern*

Records & Tape Serv. v. Goldman, 502 So. 2d 413, 414 (Fla. 1986); *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977); *State ex rel. B.F. Goodrich Co. v. Trammell*, 140 Fla. 500, 503–04, 192 So. 175 (1939). The writ is discretionary rather than of right, *Goldman*, 502 So.2d at 414; narrow in scope and operation; and must be employed with caution, only in emergency cases, to prevent an impending injury where no other appropriate and adequate legal remedy exists. *Mandico*, 605 So. 2d at 853–54.

This case is an utterly unsuitable candidate for extraordinary intervention by this Court. To accept the State's request for a special dispensation from the ordinary rules of appellate review would be to unsettle broad swathes of Florida law.

Far from acting *outside* its jurisdiction, the circuit court properly exercised its jurisdiction when it denied the State's untimely motion – filed nearly three years after the circuit court's order became final. Decades of Florida precedent bar trial courts, civil or criminal, from reopening judgments long final, not appealed, and past all rehearing deadlines, even when the judgment requires further proceedings in that same court. *See e.g. Shelby Mut. Ins. Co. v. Pearson*, 236 So. 2d 1, 3 (Fla. 1970) (holding "trial court has no authority to alter, modify or vacate an order or judgment" except in the manner and time frame provided by the applicable rules of procedure, rejecting the argument that a trial court has jurisdiction to correct its own judgments at any time); *14302 San Pablo Place SPE, LLC v. VCP-San Pablo, Ltd.,* 92 So. 3d

320 (Fla. 1st DCA 2012) (reversing trial court's ruling three-months late of a motion for clarification because "the period for rehearing or clarification had passed and the trial court was not ruling on a motion filed under Florida Rule of Civil Procedure 1.540"; the "court lacked jurisdiction to enter the order at issue"); *State v. Morris*, 359 So. 2d 478, 479 (Fla. 1st DCA 1978) ("The jurisdiction of the trial court terminates with the denial of a motion for new trial, and the court may not entertain a petition for rehearing of a motion for new trial, in the absence of certain critical allegations such as fraud or clerical error"); *Schaffer v. State*, 296 So. 2d 569, 570 (Fla. 3d DCA 1974) ("Here the court was without jurisdiction to vacate the order for new trial on the state's motion for rehearing which was unauthorized and untimely"); *Fiber Crete Homes, Inc. v. Div. of Admin*., 315 So. 2d 492 (Fla. 4th DCA 1975) ("Simply stated, there is no provision in the rules of civil procedure for a rehearing of a denial of a motion for a new trial and rehearing. The trial court, therefore, appropriately denied plaintiff's motions 'for limited rehearing' "); *State Farm Mut. Auto. Ins. Co. v. Miller*, 688 So. 2d 935 (Fla. 4th DCA 1997) (holding circuit court's order, granting motion for rehearing of denial of motion for new trial based on new decision from appellate court, improper because "trial court was without authority to consider it"); *Abram v. Wolicki*, 864 So. 2d (Fla. 4th DCA 2003) (holding "trial court in the instant case was without authority to withdraw its prior" denial of motion for new trial and to "enter an order granting a new trial" and the order granting new

trial was therefore "a nullity"; thus directing "trial court to reinstate the final judgment in favor of Abram").

To grant the State a writ of prohibition here would be to suggest that all those cases were wrongly decided and to create pervasive confusion in the lower courts in the future.

3. The State's position is irreconcilable with the procedural rules governing rehearings.

When this Court adopted the rules governing motions for rehearing in 3.851[3] cases in 2001 and in 3.850[4] cases in in 2013, it was in the context of the preceding decades of caselaw (some civil and some criminal, cited in the previous section) laying out the principle that court rules prescribing procedures for rehearing/ reconsideration motions are exclusive. *See*, *e.g.*, *Shelby Mut. Ins. Co.*, *supra*, (holding in a civil case that "the trial court has no authority to alter, modify or vacate an order or judgment" except in the manner and time frame provided by the applicable rules of procedure, and rejecting claim that the trial court has jurisdiction to correct its own judgments at any time); *see also* H. Michael Muñiz, "Trial Court Rehearings Compared with Appellate Court Rehearings," *Florida Bar Journal*, vol. 94, no. 2 (Mar/Apr 2020), available at: https://www.floridabar.org/the-florida-bar-journal/trial-court-rehearings-compared-with-appellate-court-rehearings/ ("Under

[3] Florida Rule of Criminal Procedure 3.851.
[4] Florida Rule of Criminal Procedure 3.850.

the present rules, after the rendition of the final judgment, the trial court retains jurisdiction for the [15]-day period during which a motion for rehearing may be filed and, if filed, until disposition of the motion. The trial court thereafter loses jurisdiction except to enforce the judgment and except as provided by Florida Rule of Civil Procedure 1.540. Once beyond the reach of Rule 1.540(b), ***the final judgment passes into the unassailable realm of finality.***" (emphasis added)).

No plausible legal argument supports the State's claim that a trial court nonetheless possesses "inherent authority" to reconsider final grants of postconviction relief based on a subsequent change in caselaw. Nor does any authority support any higher court's inherent authority to do so.

The rules of criminal and appellate procedure strictly prescribe the limits and conditions under which a trial court may reconsider a prior final ruling on a postconviction motion, or under which this Court may hear an appeal of such order. The rules jurisdictionally bar any attempts to rescind a final order granting postconviction relief. *See* "Florida's Third Species of Jurisdiction," *Florida Bar Journal*, vol. 82, no. 3 (Mar 2008), available at: https://www.floridabar.org/the-florida-bar-journal/floridas-third-species-of-jurisdiction/ (discussing the concept and force of procedural jurisdiction).

4. The resentencing is a new and separate proceeding.

In its effort to end-run decades of precedent barring its late request to reopen the judgment, the State spins out an intricate argument that Mr. Jackson's resentencing is merely a continuation of his postconviction proceedings. (Petition, p. 25-27). Quite apart from the fact that acceptance of the State's proposition would not advance its position, the proposition itself is wrong. As this Court has explained, "postconviction proceedings and resentencing proceedings are separate, legally discrete proceedings," *Taylor v. State*, 140 So. 3d 526, 529 (Fla. 2014), entirely new, independent proceeding[s]," *id.*, and "an order disposing of a postconviction motion . . . is a final order for purposes of appeal, [even] when the relief granted requires subsequent action in the underlying case, such as resentencing." *Id.* at 527.

The State asserts that the de novo nature of resentencing proceedings this Court has recognized does not compel the conclusion that the circuit court lost jurisdiction when it issued its order granting *Hurst* relief. (Petition, p. 27). But that is not the point. Of course the de novo nature of resentencings says nothing about ongoing jurisdiction. But the procedural and jurisdictional rules set out above do. And those rules make clear that the trial court loses jurisdiction to reconsider an order granting (or denying) relief once the time for rehearing has expired. *Taylor* only confirms that conclusion.

5. New decisional law does not traditionally affect final judgments.

None of these doctrines barring the relief the State seeks cease to apply because this Court has partially receded from *Hurst*. This Court confronted a similar issue in *State v. Owen*, 696 So. 2d 715 (Fla. 1997). On direct appeal, this Court reversed Owen's convictions and sentences based on its interpretation of federal law and a determination that Owen's confession was erroneously admitted because he had made, "at the least, an equivocal invocation of the *Miranda* right to terminate questioning." *Id*. at 717 (citing *Owen v. State*, 560 So. 2d 207, 211 (Fla. 1990)).

Prior to Owen's retrial, the Supreme Court of the United States issued *Davis v. U.S.*, 512 U.S. 452 (1994), holding that police are not required to stop questioning a suspect or seek clarification based on an equivocal response. *Id*. The State moved the trial court to reconsider the admissibility of Owen's confession based on *Davis*, but the trial court held the confession remained inadmissible. *Id*. The State filed a petition for writ of certiorari, which was denied by the District Court of Appeal. In denying the State's petition, the court held, "If we were certain that *Davis* was the law in Florida, and *if this specific confession had not already been held inadmissible* by the Florida Supreme Court, we would grant certiorari, because the pretrial refusal to admit this confession would be a departure from the essential requirements of law for which the state would have no adequate remedy by review." *State v. Owen*, 654 So.2d 200, 201 (Fla. 4th DCA 1995) (emphasis supplied). The Court then certified

the following question to this Court:

> DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN *DAVIS* APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF *TRAYLOR* ?

Id. at 202. Accepting discretionary review, this Court held that the trial court could reconsider the suppression motion in light of *Davis*, but that its prior reversal of the conviction stood:

> The State would have this Court reinstate Owen's convictions on the ground that a retrial is unnecessary in light of our decision. We are unwilling to go that far. Our prior decision which reversed Owen's convictions and remanded for a new trial is a final decision that is no longer subject to rehearing. With respect to this issue, Owen stands in the same position as any other defendant who has been charged with murder but who has not yet been tried. Just as it would be in the case of any other defendant, the admissibility of Owen's confession in his new trial will be subject to the *Davis* rationale that we adopt in this opinion. *However, Owen's prior convictions cannot be retroactively reinstated*.

Id. at 720 (emphasis added). Mr. Jackson's vacated death sentences should be treated no differently than Owen's vacated conviction. His death sentences cannot be retroactively reinstated.

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The State's Petition fails to offer a legitimate basis to invoke the extraordinary jurisdiction of this Court. The Court should deny the State's Petition for Prohibition and for this Court's All Writs jurisdiction.

ARGUMENT II

The State's Failure to Appeal or Otherwise Challenge the Circuit Court's Grant of Mr. Jackson's New Penalty Phase Precludes the Relief it is Seeking.

1. The State is bound by rules of procedural default.

It is long-settled Florida law that rules of procedural default apply equally to the State. For this Court to hold otherwise in this case would violate Mr. Jackson's due process rights. In *Cannady v. State*, 620 So. 2d 165 (Fla. 1993), this Court vacated Mr. Cannady's death sentences because the trial court improperly found both of the aggravating circumstances upon which the sentence rested (CCP and HAC). In trying to salvage the death sentence, the State argued on appeal that death was still appropriate because "the record supports the additional statutory aggravating factor of prior violent felony convictions based on Cannady's contemporaneous convictions in this case," *id*. at 170, and urged this Court to essentially act as the trial judge and impose an aggravating factor that had not been submitted below to the judge or the "advisory jury." *Id*. This Court refused, holding:

> Under the circumstances of this case, it would be improper for this Court to impose the death penalty based on a single aggravating factor not found by the trial judge. Further, the aggravating factor of prior violent felony convictions was not submitted to the advisory jury and, apparently, was not submitted as an aggravating factor to the trial court in the penalty phase of this proceeding. *Additionally, the State did not file a cross-appeal on this issue. Consequently, this issue has not been preserved for appeal.*

> *Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State. As such, we find that it would be inappropriate, and possibly a violation of due process principles, to remand this cause for resentencing.* To do so would allow the State an opportunity to present an additional aggravating circumstance when the State did not initially seek its application, object to its non-inclusion, or seek a cross-appeal on this issue.

Id. at 170 (emphasis added).

This Court's more recent post-*Hurst* decision in *State v. Silvia*, 235 So. 3d 349 (Fla. 2018), holding that a waiver by a capital defendant precludes the right to seek *Hurst* relief, demonstrates this Court's consistent holdings on the finality of judicial orders and decisions when a party fails to exercise its appellate rights. Mr. Silvia waived his post-conviction claims; this Court held that Silvia's waiver was valid in 2013. *Silvia v. State*, 123 So. 3d 1148 (Fla. 2013) (unpublished). More than three years later, Mr. Silvia, who would have been entitled to *Hurst* relief under United States Supreme Court and Florida Supreme Court precedent, moved to reinstate his postconviction proceedings and obtain *Hurst* relief. The circuit court concluded that he was entitled to do so and granted him a new penalty phase.

In that case, the State timely exercised its appellate rights, and this Court reversed. In refusing to allow Silvia to reinstate his postconviction proceedings to obtain *Hurst* relief, this Court, relying on its opinion in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), explained "that a defendant cannot subvert [a] right ... by waiving that right and then suggesting that a subsequent development in the law has

fundamentally undermined his sentence." *State v. Silvia*, 235 So. 3d 349, 351 (Fla. 2018) (internal quotations and citations omitted). The State is now seeking to do what this Court unequivocally told Silvia he could not. If procedural default rules apply equally to the State and capital defendants, as this Court has expressly stated they do, the State cannot now be allowed to change the rules and seek preferential treatment.

2. The plain language of Florida Rule of Criminal Procedure 3.851 and Florida Rule of Appellate Procedure 9.142 do not permit a belated appeal by the State.

As noted above, at its core, the State's Petition is effectively a motion to allow a belated appeal. However, there is no provision under Florida Rule of Criminal Procedure 3.851 or Florida Rule of Appellate Procedure 9.142 for the State to take a belated appeal. As will be discussed below, the plain language of both of those rules precludes the relief the State is seeking.

The circuit court ordered that Mr. Jackson was entitled to a new penalty phase on June 9, 2017. Pursuant to Fla. R. Crim. P. 3.851(f)(7), the State had 15 days to file a Motion for Rehearing. Pursuant to Fla. R. Crim. P. 3.851(f)(8), the State had 30 days in which to file a Notice of Appeal. The State had to act by June 26, 2017 for Rehearing (the 15th day would have been Saturday, June 24, 2017) or by July 10, 2017 for a Notice of Appeal (the 30th day would have been Sunday, July 9, 2017).

Instead, the State conceded relief and the parties moved forward with preparation for Mr. Jackson's new penalty phase.[5]

"It is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction." *Koppel v. Ochoa*, 243 So. 3d 886, 891 (Fla. 2018) (interpreting rule governing proposals for settlement, quoting *Saia Motor Freight Line, Inc., v. Reid*, 930 So. 2d 598, 599 (Fla. 2006)); *see also Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998) ("Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules," citing *Syndicate Properties v. Hotel Floridian Co*., 94 Fla. 899, 903, 114 So. 441, 443 (1927); *Merchants' Nat'l Bank v. Grunthal*, 39 Fla. 388, 394, 22 So. 685, 687 (1897)). Several such rules dictate the result here.

First, "when the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning. *Thayer v. State*, 335 So. 2d 815 (Fla. 1976); *McDonald v. Roland*, 65 So. 2d 12 (Fla. 1953); A.*R. Douglass, Inc. v. McRainey*, 102 Fla. 1141 (1931); *Van Pelt v. Hilliard*, 75 Fla. 792 (1918)." *Brown v. State*, 715 So. 2d 241 (Fla. 1998). In this case, there is nothing ambiguous about the governing rules.

[5] But for the arrival of Hurricane Dorian in September of 2019, Mr. Jackson's new penalty phase would have been completed long before this Court issued its decision in *Poole* in January, 2020, and before the State moved to reinstate his death sentence on February 4, 2020.

Second, Fla. R. Crim P. 3.851 and Fla. R. App. P. 9.142 explicitly grant a defendant a right to a belated appeal, but are silent about the right of the State to file one. This Court's well-established statutory construction principle of *expressio unis est exclusio alterius* applies, demonstrating that the omission precludes the State from exercising any such unexpressed right. *See Schoeff v. R.J. Reynolds Tobacco Co.,* 232 So. 3d 294, 304 (Fla. 2017); *Thayer*, 335 So. 2d at 817.

Florida Rule of Criminal Procedure 3.851(f)(8) outlines the procedure for an appeal:

> Any party may appeal a final order entered on a defendant's motion for rule 3.851 relief by filing a notice of appeal with the clerk of the lower tribunal within 30 days of the rendition of the order to be reviewed. Pursuant to the procedures outlined in Florida Rule of Appellate Procedure 9.142, *a defendant under sentence of death may petition for a belated appeal.*

Fl. R. Crim. P. 3.851(f)(8) (emphasis added). The relevant Florida Rule of Appellate Procedure is similarly drafted and references only the defendant/petitioner's rights to take a belated appeal:

> **(3) Petitions Seeking Belated Appeal.**
>
> **(A) Contents.** A petition for belated appeal shall include a detailed allegation of the specific acts sworn to by the *petitioner or petitioner's counsel* that constitute the basis for entitlement to belated appeal, including *whether the petitioner requested* counsel to proceed with the appeal and the date of any such request, whether counsel misadvised the petitioner as to the availability of appellate review or the filing of the notice of appeal, or whether there were circumstances unrelated to counsel's action or inaction, including names of individuals involved and date(s) of the occurrence(s), that were beyond the

> petitioner's control and otherwise interfered with the petitioner's ability to file a timely appeal.
>
> **(B) Time limits.** A petition for belated appeal shall not be filed more than 1 year after the expiration of time for filing the notice of appeal from a final order denying rule 3.851 relief, unless it alleges under oath with a specific factual basis that the petitioner;
>
> > (i) was unaware an appeal had not been timely filed, was not advised of the right to an appeal, was misadvised as to the right to an appeal, or was prevented from timely filing a notice of appeal due to circumstances beyond the petitioner's control; and
> > (ii) could not have ascertained such facts by the exercise of due diligence. *In no case shall a petition for belated appeal be filed more than 2 years after the expiration of time for filing the notice of appeal.*

Fla. R. App. P. 9.142(b)(3) (emphasis added). Again, the rule provides no parallel right for the State to seek a belated appeal in a death penalty case.

To imply such a right would not only contradict the rules specifically governing the present context but, as noted in Part I. 2-3 of this Response, unsettle the law applicable to a wide variety of other situations.

3. The State has forfeited whatever putative appellate rights it might have had.

Even if this Court could entertain the idea that it had inherent power to grant the State a belated appeal, there would be no equitable reason to exercise the power in this case. The State's claim to have acted in good faith by not appealing when the law was adverse to it is disingenuous at best. Clearly, in *Poole* the State chose to challenge what it believed was an erroneous decision by this Court and did not feel bound by existing adverse precedent. The State had ample and equal opportunity to

challenge the grant of relief in this case and affirmatively opted not to do so. To allow the State to reinstate Mr. Jackson's death sentence 970 days after it affirmatively waived its right to do so would offend fundamental fairness and due process, and threaten the legitimacy of the Florida courts. *See State v. Anderson*, 821 So. 2d 1206, 1209 (Fla. 5th DCA 2002) ("Finality is desirable in criminal actions…There is simply no rule or statutory authority for a trial court to reconsider the merits of an unappealed final order denying post-conviction relief some six months after its rendition."); *Rodriguez v. State*, 637 So. 2d 934 (Fla. 2d DCA 1994) (denying Rodriguez' motion for belated appeal filed more than two years after final judgement).

This Court should deny the Petition for lack of jurisdiction.

ARGUMENT III

Reimposing Mr. Jackson's Death Sentence Would Violate Mr. Jackson's Eighth and Fourteenth Amendment Rights Under the United States Constitution and the Corresponding Provisions of the Florida Constitution.

Reinstating Mr. Jackson's death sentence would be unconstitutionally arbitrary. In *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972), Justice Potter Stewart famously declared the death penalty unconstitutional as administered in 1972 because it struck randomly, like lightning:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se]

> petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed.

Id. (Stewart, J., concurring)*; see also, id.* at 310 ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

The Supreme Court of the United States only permitted Florida and other states to reinstate the death penalty in 1976 with the understanding that the death penalty no longer would be "inflicted in an arbitrary and capricious manner." *Gregg,* 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

While at least 34 other Florida prisoners have been resentenced to life imprisonment based on *Hurst v. State*, and six others have been resentenced under the current death penalty statute (left undisturbed by *Poole*), reinstatement would place Mr. Jackson back in the queue for execution. Under reinstatement, the determination of who among the remaining capital defendants receives life imprisonment or death would not be predicated on the facts of their crimes or the circumstances of their lives, but on random, wanton events such as delays in court

scheduling caused by hurricanes or pandemics and other factors unconnected to culpability, including the availability of prosecutors, defense counsel, judges, courtrooms, jurors, and the investigatory and expert resources all needed for completion of a capital sentencing trial. Such a scheme violates the Supreme Court's directive that capital punishment determinations "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887, n.24 (1983)).

Reinstating Mr. Jackson's death sentence would violate his Eighth and Fourteenth Amendment rights to be free from execution arbitrarily and capriciously imposed.

That is particularly so in light of the facts at hand. Since June of 2017, day after day, more than 900 in total, Mr. Jackson and his legal team have been diligently preparing for his resentencing hearing. He has met with his attorneys repeatedly and his family has divulged the most sensitive, shameful, and difficult incidents of his upbringing as his defense team shapes a compelling mitigation case to save his life. For this Court to arbitrarily nullify the judicially-created expectations Mr. Jackson has held for years, would "involve the unnecessary and wanton infliction of pain." (*Gregg,* 428 U.S. at 173) by superadding unneeded psychological distress to the sentence of death itself. *See Weems v. U.S.*, 217 U.S. 349, 370 (1909).

By reimposing a death sentence, the vacatur of which was final for three years under well-established Florida law, the State would, without any sufficiently countervailing justification, be causing undue emotional and psychological harm to Mr. Jackson in violation of the Eighth Amendment.

Turning from Mr. Jackson's personal circumstances to Florida's responsibility to run its capital punishment system in a rational manner, to grant the State's petition here would be unconstitutionally arbitrary and a denial of equal protection under the Fourteenth Amendment as well as a violation of the Eighth Amendment.

No rational basis justifies Mr. Jackson being returned immediately to the execution queue without a constitutionally sound penalty phase, while other similarly-situated prisoners have been resentenced to life under *Hurst v. State* and the subsequent statutory changes to Florida's capital sentencing scheme.

To single out Mr. Jackson for the reimposition of death without a new penalty phase simply because of the vagaries of the pace of the proceedings in his case would violate his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

That result would also violate his right to be free of arbitrary infliction of the punishment of death under the Eighth Amendment to the United States Constitution

because it would be based on chance and not a determination that Mr. Jackson's case is one of the most aggravated and least mitigated. *Cf. Proffit v. Florida,* 428 U.S. 242 (1976).

Finally, the uneven application of a court's rules, some applied retroactively to final litigation and some not, combined with the jarringly disparate results in similarly-situated cases, would flout the fundamental fairness interests enshrined in the Fourteenth Amendment's concept of Due Process. *See Carmell v. Texas*, 529 U.S. 513, 533 (2000) (holding "there is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."). It would be fundamentally unfair for this Court to allow the State to belatedly upend the law it chose not to challenge three years ago.

ARGUMENT IV

This Court's Decision in *Poole* is Contrary to the Sixth and the Eighth Amendments to the United States Constitution and the Corresponding Provisions of the Florida Constitution.

1. Applying the reasoning of *Poole* to Mr. Jackson's case would violate the Eighth Amendment to the United States Constitution.

The Eighth Amendment requires each state to ensure that the death penalty is reliably inflicted only on the most morally culpable subset of those criminals who commit the most serious homicides. *See, e.g., Roper v. Simmons,* 543 U.S. 551, 568,

(2005); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The essentially non-existent sentencing role that *Poole* allocates to the jury is not only at odds with decades of binding precedent but also disregards the lessons of centuries of common law history, contemporary consensus in the states, and "the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). The system sanctioned by *Poole* is irremediably inconsistent with the Eighth Amendment, and therefore applying the Florida death penalty as interpreted by *Poole* to Mr. Jackson would violate the United States Constitution.

a. The Eighth Amendment requires that the ultimate decision to impose a sentence of death rather than life must be made by a unanimous jury.

At its broadest level, *Poole* is irreconcilable with the Eighth Amendment's requirement that the ultimate decision to impose a sentence of death rather than life must be made by a unanimous jury. Unanimous jury sentencing in capital cases is a fundamental necessity under the Eighth Amendment to the United States Constitution. As the Court is well aware, *see Poole*, at *20-21 (Labarga, J., dissenting), only Alabama and now, again, Florida, cling to the contrary position, which is at odds with both contemporary standards of decency and the overwhelming consensus of American jurisdictions. Nearly every other jurisdiction has concluded

that a jury unanimity requirement reflects the vital role of the jury as the conscience of the community, and recognizes that it is deeply rooted in common law and is required in capital cases.

Capital sentencing procedures that have been repudiated as a result of the "evolving standards of decency that mark the progress of a maturing society," *Atkins*,[6] violate the Eighth Amendment, *see Woodson*;[7] *Roberts*,[8] as do capital sentencing procedures which are out of touch with the overwhelming consensus of contemporary practice in jurisdictions nationwide. *See Beck v. Alabama*, 447 U.S. 625, 635 (1980).

These considerations demonstrate that the Eighth Amendment demands a unanimous jury determination in favor of a death sentence before a state may impose that sentence. To give Mr. Jackson anything less, would violate his federal constitutional rights.[9]

b. Even if the Eighth Amendment does not require jury unanimity in death sentencing, it at least requires a jury to make the ultimate decision to impose a death sentence.

Mr. Jackson maintains that, for the reasons discussed above, the Eighth Amendment requires both jury sentencing *and* jury unanimity in capital cases.

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[6] *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).
[7] *Woodson v. North Carolina*, 428 U.S. 280 (1976).
[8] *Roberts v. Louisiana*, 428 U.S. 325, 332-33 (1976).
[9] Of course, the Florida Legislature has also adopted unanimity by statute, Fla. Stat. § 921.141(2), which, as previously noted, is still in effect, even after *Poole*.

However, this Court need not accept that jury unanimity is a federal constitutional requirement in order to conclude that application of *Poole* in this case would violate Mr. Jackson's Eighth Amendment rights. It is enough for the Court to agree that the Eighth Amendment at least requires, as Justices Stevens, Breyer, and others have explained, that a jury make the ultimate decision to impose a death sentence, whether unanimously or not. *See, e.g., Harris* v. *Alabama,* 513 U. S. 504, 515-526 (1995). (Stevens, J., dissenting); *Ring*, 536 U.S. at 615-18 (Breyer, J., concurring).

Those considerations carry even more weight today. *See, e.g., Reynolds v. Florida*, 139 S. Ct. 27, 28-29 (2018) (Breyer, J., statement respecting the denial of certiorari). As more and more states abandon the death penalty altogether, the split in community opinion on whether the death penalty itself is "cruel and unusual" has only deepened. The divide has widened as more people today believe that the death penalty continues to be imposed based on convictions that may turn out to be unreliable, that it can be applied in a geographically, racially, and socio-economically biased manner, and that delays between sentencing and execution are excessively cruel.

To sufficiently capture the community divide, juries, rather than "a single government official," *Ring* 536 U.S. at 619 (Breyer, J., concurring), are the only mechanism that can fulfill what the Supreme Court of the United States has said is required for a death sentence that comports with the Eighth Amendment: an

expression of the "conscience of the community on the ultimate question of life or death," *Witherspoon v. State of Ill.*, 391 U.S. 510, 519 (1968), and whether the particular crime at hand is "so grievous an affront to humanity that the only adequate response may be the penalty of death," *Gregg*, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, JJ.). Even if this Court does not accept that the Eighth Amendment requires jurors to be unanimous in making a death determination, it should at least decide that the Eighth Amendment requires a jury to make the ultimate decision. For that reason, even setting unanimity aside, *Poole* cannot be constitutionally applied to Mr. Jackson.

c. At a minimum, the Eighth Amendment requires that a jury have meaningful input into a capital sentencing decision.

At a minimum, *Poole* cannot be squared with the Eighth Amendment, and should not be applied to Mr. Jackson, because even if jury unanimity in capital sentencing is not a federal constitutional requirement, and even if a jury need not make the ultimate decision to impose the death penalty, it is manifestly required under the Eighth Amendment that a jury have some meaningful input into a capital sentencing decision. Meaningful jury input in death sentencing is required to ensure that each individual decision to impose capital punishment comports with prevailing moral standards. *Woodson*, 428 U.S. at 302-05.

The core tenet of present-day Eighth Amendment capital jurisprudence is that "'the sentence imposed at the penalty stage should reflect a reasoned moral response

to the defendant's background, character, and crime,'" *Abdul-Kabir v. Quarterman*,[10] and "'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender,'" *Eddings v. Oklahoma*.[11] Whether the circumstances of the crime as well as the defendant's character and history render him death-worthy requires a decision that must be made by a jury which deliberates with careful solemnity on just that question and feels the weight of its importance. *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985).

d. The Eighth Amendment forbids a "gotcha" system in which by voting for guilt a jury is unconsciously voting for a death sentence.

Independent of the foregoing, a "gotcha" system in which by voting for guilt a jury is unknowingly voting for a death sentence – which may be imposed without the jury ever affirmatively determining that death rather than life is the appropriate punishment – is unconstitutional. *See Woodson*, 428 U.S. at 293; *Jackson v. Dugger*, 857 F.2d 1469, 1473-74 (11th Cir. 1988) (vacating death sentence because Florida's presumption, relied on by *Poole* at *10, that death is appropriate once the existence of an aggravating circumstance is established, "vitiates the individualized sentencing determination required by the Eighth Amendment")*; see also Lockett v. Ohio*, 438 U.S. 586 (1978); *cf. Poole*, at *11 (jury's role following guilt phase findings limited to recommending mercy if warranted). The Eighth Amendment forbids imposition

[10] 550 U.S. 233, 252 (2007) (internal citations omitted).
[11] 455 U.S. 104, 112 (1982).

of a death sentence based on the vote of a guilt-phase jury that was unaware it was effectively deciding whether a death sentence would be imposed. *Caldwell*, 472 U.S. at 328-30.

2. The Sixth Amendment requirement of a finding of a statutory aggravating factor cannot be satisfied by a prior (contemporaneous) conviction based on a jury's verdict of guilt.

A death sentence cannot be imposed without a jury finding of the existence of a statutory aggravating factor. *Poole* at *10. Section 921.141 (6)(b), Florida Statutes (2019), sets forth as an aggravating factor that "[t]he defendant was previously convicted of … a felony involving the use or threat of violence to the person." This Court previously rejected Mr. Jackson's *Ring* claim on the premise that the jury found this statutory aggravating factor by virtue of its verdict at the conclusion of the first phase of trial: "Jackson was convicted of a prior violent felony (i.e., the contemporaneous murders…)." *Jackson v. State*, 18 So. 3d 1016, 1025 n.6 (Fla. 2009).

There are several reasons why this verdict for a contemporaneous conviction is not a substitute for the Sixth Amendment's requirement that a jury find this aggravator at the trial's conclusion. First, the prior conviction is not a valid exception to *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000). Second, this aggravator requires consideration of more than just the bare elements of the crime at conviction. Third, by its very terms, "crime of violence or threat of violence" suffers

from vagueness to the extent that it cannot be presumed that the trial judge's finding will always coincide with that of the jury. And finally, the jury's finding during the first phase of Mr. Jackson's trial was made with no forewarning that its vote for both homicide convictions meant that the potential for the death penalty was preordained, and necessarily did not appreciate its "awesome responsibility." *Caldwell v. Mississippi* 472 U.S. 320, 328-30 (1985) (plurality).

a. A prior conviction is not a valid Sixth Amendment exception to the *Apprendi* requirement that a jury find every fact upon which an enhanced sentence is based.

The "prior" conviction factor has been repeatedly excused from Sixth Amendment requisites based on one decision, *Almendarez-Torres v. U.S.*, 523 U.S. 224, 230 (1998). But a careful reading of that case reveals that the proposition for which it has been since cited is very much not the holding. The decision is limited to a construction of a federal deportation crime enhanced by a prior aggravated felony conviction, and is premised on a search for the legislative intent underlying the statute. *Id.* at 226-240, 243-248. The question presented was "whether Congress intended subsection [1326](b)(2) to set forth a sentencing factor or a separate crime." *Id.* at 230. The answer was that the enhancement was a sentencing factor that need not be included in the indictment, because of basic rules of statutory construction.

Indeed, *Almendarez-Torres* does not even cite the Sixth Amendment. To the extent it is relevant to any *Hurst v. Florida* analysis, the decision, in rejecting the

statutory construction urged by the defendant, explains that Mr. Almendarez-Torres' interpretation would run afoul of three cases, notably all of which have since been overruled by the Supreme Court: *Walton v. Arizona*, 497 U.S. 639 (1990), *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), and *Spaziano v. Florida*, 468 U.S. 447 (1984).[12] In dissent, Justice Scalia warned of the unfairness to "deprive the defendant of a jury determination (and a beyond-a-reasonable-doubt burden of proof) on the critical question of the prior conviction". *Id.* at 267 (Scalia, J., dissenting).

When the Court did address the Sixth Amendment implications in *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000), of course, the Court did state the oft-cited "holding" that the Due Process Clause and the Sixth Amendment of the United States Constitution require that "any fact that increases the penalty for a crime

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[12] In addition to construing Congress's intent, the Court was concerned with basic notions of fairness should it be necessary to present evidence of a prior aggravated felony conviction to the trial jury:

> Finally, the contrary interpretation – a substantive criminal offense – risks unfairness. If subsection (b)(2) sets forth a separate crime, the Government would be required to prove to the jury that the defendant was previously deported "subsequent to a conviction for commission of an aggravated felony." As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice.

Id. at 234-35 (citations omitted). This concern is of no matter to Florida's capital punishment scheme, under which the jury hears evidence of the defendant's prior conviction.

beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 489-90. The Court also acknowledged the exception for proof of "the fact of a prior conviction," that *Almendarez-Torres* ostensibly permitted. *Id.*, 530 U.S. at 489-90.[13] But the Court was quick to note that the issue in *Apprendi* was "the sufficiency of the indictment" *id.* at 488, and went so far as to offer that "it is arguable that *Almendarez-Torres* was incorrectly decided . . . and that a logical application of our reasoning today should apply if the recidivist issue were contested," which Mr. Apprendi had not done. *Id.* at 489-90.

Thereafter, when a post-*Apprendi* challenge to judicial sentencing under a recidivist-enhancement provision came before the Court in *Shepard v. United States*, 544 U.S. 13, 16 (2005), a plurality avoided the *Apprendi* issue by construing the provision to "limit the scope of judicial factfinding on the disputed generic character of a prior plea" so that a judge could only "examin[e] the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 25-26.

[13] Of course, the Court also allowed for an exception for capital cases, *Apprendi*, 530 U.S. at 496-97, an exception which the Court overturned two years later in *Ring*. All indications are that a similar fate awaits *Almendarez-Torres.*

In a concurring opinion, Justice Thomas noted that *Almendarez-Torres* was not only wrong, but that a majority of the Court so believed:

> *Almendarez–Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez–Torres* was wrongly decided. See 523 U.S., at 248–249, 118 S.Ct. 1219 *28 SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi, supra,* at 520–521, 120 S.Ct. 2348 (THOMAS, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez–Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez–Torres,* despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."

Id. at 27-28 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted).

The *Shepard* plurality approach, that of dodging the constitutional question, was again adopted in the majority opinion in *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). But to the extent that the Court engaged in Sixth Amendment analysis, it explained the limited "fact" that could fall within the putative *Almendarez-Torres* "prior-conviction" exception:

> [A] construction of [the federal Armed Career Criminal Act] allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of

> a prior conviction. That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

Id. at 2243 (citations omitted).

Justice Thomas again took the opportunity to reiterate that the so-called "prior conviction" exception to *Apprendi* "is wrong" and urged the Court to reconsider *Almendarez-Torres. Id.* at 2258-59 (Thomas, J., concurring). "The Sixth Amendment problem persists" even if a judge only determines "that a prior conviction was entered," and does not look past that by "attempting to discern what facts were necessary to a prior conviction." *Id.* at 2259 (citations and internal quotation marks omitted).

Mr. Jackson asserts that the correct Sixth Amendment rule is that stated by Justice Thomas, even if the only issue before a Florida jury for applying the prior violent felony conviction was the bare fact of a prior conviction. But it is not that simple.

b. The statutory aggravating factor of conviction of a prior felony involving violence or threat of violence involves consideration of the facts surrounding the prior felony.

Almendarez-Torres, as constrained, does not permit a Sixth Amendment exception for the statutory aggravating factor delineated in § 921.141(6)(b),Fla. Stat., that the defendant was "previously convicted of … a felony involving the use or threat of violence to the person." Consideration of this aggravating factor requires more than "the simple fact of a prior conviction." *Mathis*, 136 S. Ct. at 2243. This Court has repeatedly recognized that the contours are not neatly defined, and may require more than just the consideration of the elements of the crime, indeed findings that only a jury can make.

For example, in *Bevel v. State*, 983 So. 2d 505, 518 (Fla. 2008), the Court stated the established rule that "whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime." (citing *Rose v. State,* 787 So. 2d 786, 800 (Fla. 2001)). *Rose*, in turn, elaborates further:

> Section 921.141(5)(b), Florida Statutes, provides: "The defendant was previously convicted of another capital felony or another felony involving the use or threat of violence to the person." We have held that the "finding of a prior violent felony conviction aggravator only attaches 'to life-threatening crimes in which the perpetrator comes in direct contact with a human victim.'"

Id.

But when exactly an offense rises to the level of life-threatening is not a mechanistic determination. For example, in *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981), the trial judge based his finding of this aggravator on the defendant's "two convictions of breaking and entering with intent to commit a felony, two convictions of escape, one conviction of grand larceny, and one conviction of possession of a firearm by a convicted felon." This Court disapproved this finding because proof was lacking that the crimes were life-threatening with direct contact with a human victim, and held "that none of these crimes falls within the meaning of this aggravating circumstance as defined by the statute." *Id.* In *Ford v. State*, 374 So. 2d 496, 502 (Fla. 1979), the trial judge found that this aggravating circumstance applied on the following basis:

> The defendant has been found guilty of breaking and entering to commit a felony, which would obviously involve the threat of violence to the person of anyone whom he might have confronted on the premises. Further, he has admitted the unlawful sale of narcotics drugs, which likewise involves a threat to the safety of members of the public.

Id. at 501, n.1. This Court rejected this finding out of hand.

Whether a felony is one involving the use or threat of violence to the person might be proved by "documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both." *Johnson v. State*, 465 So. 2d 499, 505 (Fla. 1985), *overruled on other grounds*, *In re Instructions in Criminal*

Cases, 652 So. 2d 814 (Fla. 1995). Even a conviction for the crime of robbery has been rejected as a predicate for this aggravator, once defense counsel from the prior robbery case testified and explained the facts of the robbery offense. *Mahn v. State*, 714 So. 2d 391, 394-95, 399 (Fla. 1998).

It is evident that, contrary to the assumption in *Poole*, a jury's bare verdict of conviction does not automatically satisfy this statutory aggravator, and any contrary holding violates the Sixth Amendment principles espoused in *Hurst v. Florida.*

c. The "use or threat of violence" terminology of this aggravating factor is so opaque, that, assuming it is not unconstitutionally vague, its contours can only be determined by a jury.

The language of this statutory factor, specifically a previous conviction "of a felony involving the use or threat of violence to the person" is so subject to interpretation that it cannot be automatically applied based solely on a first-phase verdict. In a similar vein, the Supreme Court of the United States has issued repeated decisions condemning the vagueness of the "residual clause" of the federal Armed Career Criminal Act, which provides for an enhanced sentence if the defendant's crime "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 USC § 924(e)(2)(B)(ii). Deciding whether a crime fit within its ambit required a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presented a serious potential risk of physical injury. *James v. United States*, 550 U.S. 192, 208 (2007).

The Supreme Court, in overruling *James* and holding this Clause void for vagueness, noted two fatal flaws. "In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" and leaves to the imagination the "ordinary" type of crime. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). "At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. *See also U.S. v. Davis*, 139 S. Ct. 2319 (2019); *Welch v. U.S.*, 136 S. Ct. 1257 (2016).

The same can be said about Florida's statutory factor. When does a crime impose a threat to the person, and how much violence need be feared before the conduct is life-threatening? Clearly this is not an easy question.

Assuming that the factor is not itself unconstitutionally vague, its existence must be found by a jury under *Hurst v. Florida*.

d. A contemporaneous conviction does not pertain to a defendant's recidivism, and could never be subsumed within the *Almendarez-Torres* exception.

There remains one additional obstruction to packaging this aggravator neatly within what's left of the beleaguered *Almendarez-Torres* exception to *Apprendi.* Much of *Almendarez-Torres*' rationale for permitting the prior conviction to be omitted from the indictment centered on a recidivism theme. Indeed, in citing to this exception, the Court in *Apprendi* emphasized that *Almendarez-Torres* had "turned heavily" on the fact that the issue was recidivism, noting that the "fact of prior

conviction" was a "traditional, if not the most traditional" basis, for a trial judge's decision to enhance a sentence. *Apprendi*, 530 at 488.

That "recidivism" was at the heart of *Almendarez-Torres* undermines any suggestion that its so-called *Apprendi* exception could apply to the Court's interpretation of the "prior" felony conviction as including convictions prior to the penalty phase, but of crimes committed after the capital homicide. *See Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977). And using a contemporary conviction, as was done in Mr. Jackson's case, is an even greater departure from the Court's analysis in *Almendarez-Torres. See Meeks v. State*, 339 So. 2d 186, 190 (Fla. 1976) ("it is true that contemporaneous convictions do not qualify as an aggravating circumstance"), *overruled by King v. State*, 390 So. 2d 315, 320 (Fla. 1980) ("conviction for the attempted murder was a fact at the time the jury considered its recommendation to the trial judge and at the time the trial judge imposed the death sentence" and qualified for this aggravating factor), *receded from on other grounds*, *Strickland v. State*, 437 So. 2d 150 (Fla. 1983). Enhancing a capital defendant's sentence based on such "contemporaneous" convictions, which were not extant at the commencement of the trial, simply fails to implicate recidivism concerns.

Accordingly, even accepting for the moment the propriety of the *Apprendi* prior conviction exception, Mr. Jackson's contemporaneous conviction could not satisfy the requisites of *Hurst v. Florida* and the Sixth Amendment.

e. Relying on a contemporaneous conviction by a jury that is unaware that its verdict will make death the presumed sentence violates both the Eighth and the Sixth Amendment.

As described in Part IV.1.d above, a sentencing scheme under which a jury unknowingly votes for death by voting to convict violates the Eighth Amendment. It also violates the Sixth Amendment.

Beyond question, imposition of a death sentence requires a higher indicia of reliability than that needed for any other criminal sentencing. *See*, *e.g.*, *Caldwell*, 472 U.S. at 328-330; *Beck v. Alabama*, 447 U.S. 625, 638 (1980). This standard is met only when the sentence "rest[s] [] on a determination made by a sentencer" who is fully aware of its "power to determine the appropriateness of death" and appreciates this "awesome responsibility." *Caldwell*, 472 U.S. at 328-330. Such awareness ensures "that jurors confronted with the awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." *Id.* at 329-330. To state that a juror during a trial's initial phase -- especially once informed during jury selection that the death sentence would be a consideration only if there was a second phase (*e.g.*, TR ROA Vol.4, p. 44) -- will not appreciate its awesome responsibility is to state the obvious. Accordingly, a jury's verdict of guilt, entered without any knowledge of the sentencing implications, can never satisfy the Sixth Amendment mandate of *Hurst v. Florida*.

CONCLUSION

The State's Emergency All Writs Petition and Petition for Writ of Prohibition asks this Court to upend the most basic principles of finality of judgments, affirmative waiver, and long respected rules of appellate procedure: principles designed to provide a stable legal framework that insures uniform justice to all litigants. This Court should deny the Petition and remand Mr. Jackson's case to the circuit court to conduct his previously scheduled penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to the State's Emergency All Writs Petition and Petition for Writ of Prohibition has been electronically served via the Florida Courts E-Filing Portal on: Assistant Attorney General William Chappell, William.chappell@myfloridalegal.com and capapp@myfloridalegal.com and Assistant Attorney General Charmaine Millsaps, Charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com on April 2, 2020.

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