DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MICHAEL ALLEN GRIFFIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED--CAPITAL CASE

Context

In *Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016), the Florida Supreme Court held:

> **[A]ll the findings necessary for imposition of a death sentence are "elements"** that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient** to impose death, **unanimously find that the aggravating factors outweigh** the mitigating circumstances, and **unanimously recommend a sentence of death.** We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. *See Brooks v. State*, 762 So.2d 879, 902 (Fla.2000).

In *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017), the Florida Supreme Court on the basis of *Hurst v. State* vacated a death sentence and ordered a new proceeding at which a jury would have to unanimously find the elements of capital murder proven by the State beyond a reasonable doubt before a death sentence could be reimposed. The homicide at issue in *Card v. Jones* was committed in 1981. *See Card v. State*, 453 So. 2d 17, 18 (Fla. 1984).

In *Victorino v. State*, 241 So. 3d 48 (Fla. 2018), the Florida Supreme Court rejected an ex post facto challenge to holding a new proceeding at which the jury would be required to find the elements of capital murder beyond a reasonable doubt:

> Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, see § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. Thus, it does not constitute an ex post facto law, and Victorino is therefore not entitled to relief.

Victorino v. State, 241 So. 3d at 50. The homicides at issue in *Victorino v. State* occurred in 2004. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009).

Questions

1. Given the elements of capital murder identified by the Florida Supreme Court in *Hurst v. State* are being applied in a prosecution for a 1981 homicide, can Petitioner's death sentences remain intact given that his jury did not unanimously find the State had proven the elements of capital murder beyond a reasonable doubt in his prosecution for two 1994 homicides?

2. Does Florida's substantive criminal law identifying the elements of capital murder as set forth in *Hurst v. State* govern in the criminal prosecution of Petitioner for two 1994 homicides and invalidate his death sentences?

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DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MICHAEL ALLEN GRIFFIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Petitioner, **MICHAEL ALLEN GRIFFIN**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINIONS BELOW

The Florida Supreme Court's opinion appears at *Griffin v. State*, 236 So.3d 237 (Fla. 2018). The opinion is attached to this Petition as Attachment A. Mr. Griffin filed an application for an extension of time to file a Petition for a Writ of Certiorari with this Court. The request was granted and the time for filing the petition was extended until July 2, 2018. The order is attached to this Petition as Attachment B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court entered its opinion on February 2, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Eighth Amendment to the Constitution of the United States provides:

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

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

PROCEDURAL HISTORY

A. Prior Proceedings.

On May 3, 1990, Mr. Griffin was charged by indictment with one count of first degree murder, two counts of grand theft, aggravated assault, petit theft, and possession of a firearm by a convicted felon.[1] Counts 1, 2, 3, 5 and 7 of the indictment were alleged to have been committed on April 27, 1990. Count 4 was alleged to have been committed between April 23 and April 28, 1990. Count 6 was alleged to have been committed between February 25 and April 28, 1990. Co-defendants, Nicholas Tarallo and Samuel Velez were also charged.[2]

After four days of jury selection, Griffin's trial began on January 31, 1991. The jury deliberated over a two day period before Griffin was found guilty on all counts on February 8, 1991. The penalty phase began on February 13, 1991. By a vote of 10-2, the jury returned a death recommendation.

On March 7, 1991, the judge held a sentencing hearing. After hearing Griffin's statement, the judge remarked: "that was one of the most moving statements I've heard in this courtroom in the ten years I've been a criminal judge." (R 3862). He nevertheless

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[1]When Griffin was arrested on April 28, 1990, it was after an exchange of gun fire. After Griffin was captured, he was severely beaten by police. A detective saw blood all over Griffin. He also saw blood oozing from a gunshot wound on Griffin's arm. While trying to get Griffin to make a statement, the detective waited an hour before taking Griffin to hospital.

[2]Tarallo entered into a plea agreement with the State. In exchange for his testimony against Griffin, Tarallo's charges were reduced and a death sentence was taken off the table. Tarallo was the State's central witness in its case against Griffin.

imposed a death sentence.

Griffin's death sentence of death was affirmed by the Florida Supreme Court in 1994. *Griffin v. State*, 639 So. 2d 966 (Fla. 1994), *cert denied* 514 U.S. 1005 (1995).

On March 7, 1996, Griffin filed a motion for post conviction relief in the trial court. It was subsequently denied. On appeal, the Florida Supreme Court affirmed. *Griffin v. State*, 866 So. 2d 1 (Fla. 2003).[3]

Griffin filed a successive motion for post conviction relief based on *Ring v. Arizona*, 536 U.S. 584 (2002). The motion was denied. The Florida Supreme Court affirmed: "we find no merit to Griffin's claims and affirm the summary denial of postconviction relief." *Griffin v. State*, 992 so. 2d 819 (Fla. 2008) (table) (2008 WL 2415856).

B. Proceedings Giving Rise to this Petition.

On January 12, 2017, Griffin filed the successive Rule 3.851 motion at issue in this petition. On April 10, 2017, Griffin was allowed to amend the motion. He raised claims relying on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and the March 13, 2017, enactment of chapter 2017-1, Laws of Florida. In particular, Griffin argued that the Florida

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[3]The court rejected Griffin's claim of error based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In doing so, the Florida Supreme Court noted that under Florida law the jury's sentencing role in the penalty phase is to render an advisory sentence. *Griffin v. State*, 866 So. 2d at 14.

The Florida Supreme Court also rejected Griffin's argument that Florida's death penalty statute was unconstitutional saying: "This court has repeatedly rejected constitutional challenges to Florida's capital sentencing scheme." *Griffin v. State*, 866 So. 2d at 17.

Supreme Court in *Hurst v. State* had found that the statutorily defined facts necessary for a death sentence to be imposed were elements of capital murder. He argued that the statutory construction set forth in *Hurst v. State* and confirmed in Chapter 2017-1 warranted relief because his jury had not unanimously found those elements proven by the State beyond a reasonable doubt. Griffin also argued that because his jury was told its recommendation was "advisory" in nature and the sentencing decision rested with the judge, the unanimous death recommendations reflected the bias in favor of death when the jury's sense of responsibility is diminished. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Griffin's claims were orally argued at a case management conference. The circuit court denied relief. Griffin filed a timely notice of appeal.

After the record was filed, the Florida Supreme Court ordered Griffin to show cause "why the trial court's order should not be affirmed in light of th[e Florida Supreme] Court's decision in *Hitchcock v. State*, SC17-445."

Griffin argued that on the basis of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and Chapter 2017-1, his death sentence could not stand. In *Hurst v. State*, the Florida Supreme Court addressed the old version of § 921.141 in effect at the time of the homicides at issue in Griffin's case and concluded:

> Thus, 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 v. State, 202 So. 3d at 53.[4] Because these were the statutorily defined facts necessary to increase the range of punishment to include death, proving them was necessary **"to essentially convict a defendant of capital murder."** These facts were thus elements of capital murder. *Id.* at 53-54.

In *Hurst v. State*, the Florida Supreme Court held:

> [**A**]**ll the findings necessary for imposition of a death sentence are "elements"** that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient** to impose death, **unanimously find that the aggravating factors outweigh** the mitigating circumstances, and **unanimously recommend a sentence of death.** We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. *See Brooks v. State*, 762 So.2d 879, 902 (Fla.2000). As the relevant jury instruction states: "Regardless of your findings ... you are neither compelled nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings

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[4]The Florida Supreme Court explained that the presence of these specific facts was longstanding:

> the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." Id. at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).

Hurst v. State, 202 so. 3d at 53.

> are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. *See Henyard v. State*, 689 So.2d 239, 249 (Fla.1996) (quoting *Alvord v. State*, 322 So.2d 533, 540 (Fla.1975)).

Id. at 57-58. This was the holding of *Hurst v. State*.

Griffin argued to the Florida Supreme Court that *Hurst v. State* identified the statutory elements that had to have been proven beyond a reasonable doubt:

> * * * If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d at 60. However, Griffin's jury was not instructed that these elements had to be proven by the State beyond a reasonable doubt. The holding in *Hurst v. State* implicated *In re Winship*, 397 U.S. 358 (1970):

> *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979). *See also Fiore v. White*, 531 U.S. 225, 226 (2001).

Griffin also argued to the Florida Supreme Court that the resentencing it ordered in *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), would functionally be a trial as to whether Card was guilty of capital murder. The order granting "new penalty phase" had effectively reopened the issue of the defendant's guilt as to a homicide committed in 1981. *See Card v. State*, 453 So. 2d 17,

18 (Fla. 1984). Others have received the benefit of *Hurst v.* State in criminal prosecutions for homicides predating those in Griffin case. See *also Johnson v. State*, 205 So. 3d 1285 (Fla. 2016);[5] *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2017).[6]

In its February 2, 2018 opinion affirming the denial of Griffin's 3.851 motion, the Florida Supreme Court did not specifically address or analyze Griffin's argument premised upon the statutory construction set forth in *Hurst v. State*. The claim was simply denied as meritless.

The Florida Supreme Court struck Griffin's motion for rehearing without explanation.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO CONSIDER THE EFFECT ON MR. GRIFFIN'S DEATH SENTENCE OF THE FLORIDA SUPREME COURT'S READING OF THE FLORIDA CAPITAL SENTENCING STATUTE AS IDENTIFYING ELEMENTS OF CAPITAL MURDER.

Identifying the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *Alleyne v. United States*, 570 U.S. 99, 113-14 (2013) ("Defining facts that increase a mandatory statutory minimum to be **part of the substantive offense** enables the defendant to predict the legally applicable penalty from the face of the indictment.") (emphasis added).

A court decision identifying **the elements of a statutorily**

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[5]Johnson was convicted of 3 first degree murders committed in 1981. *Johnson v. State*, 438 So. 2d 774, 775 (Fla. 1983).

[6]Armstrong was convicted of first degree murder for a 1990 homicide. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994).

defined criminal offense constitutes substantive law that dates back to the enactment of the statute. *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. **It merely explained what § 924(c) had meant ever since the statute was enacted.** The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)."") (emphasis added). "A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).

In *Fiore v. White*, 531 U.S. 225, 226 (2001), this Court addressed the import of the Due Process Clause in the context the substantive law defining a criminal offense:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

Under *Winship*, each element of a criminal offense must be found proven beyond a reasonable doubt.

The Florida Supreme Court has made it clear that these elements of capital murder are longstanding when it rejected an

ex post facto challenge to holding them applicable in homicide that occurred 12 years before *Hurst v. State* issued and 13 years before Chapter 2017-1 was enacted. In *Victorino v. State*, 241 So. 3d at 50, the Florida Supreme Court explained:

> Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, see § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. Thus, it does not constitute an ex post facto law, and Victorino is therefore not entitled to relief.

The homicides at issue in *Victorino v. State* occurred in 2004. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009).

Because of the widespread problem arising in Florida capital cases in light of the statutory construction set forth in *Hurst v. State*, this Court should issue the writ. As it stands now, Griffin has received a death sentence even though he has not been convicted of capital murder as that crime has been defined under Florida substantive criminal law.

Certiorari review is warranted here to determine whether the Due Process Clause requires the substantive criminal law set forth in *Hurst v. State* and applied to a 1981 homicide in *Card v. Jones* to also be applied to Griffin criminal prosecution for a 1990 homicide.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari

review is warranted to review the decision of the Florida Supreme Court in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by US Mail, first class postage prepaid, to Melissa Roca Shaw, Attorney General's Office, 1 SE 3rd Avenue, Ste. 900, Miami, FL 33131, on this 2ND day of July, 2018.

/s/ Martin J. McClain
*MARTIN J. MCCLAIN
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Attachment A

236 So.3d 237
Supreme Court of Florida.

Michael Allen GRIFFIN, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1306
|
[February 2, 2018]

Synopsis

Background: After affirmance of defendant's murder conviction and death sentence, 639 So.2d 966, and denial of habeas corpus relief, 22 So.3d 67, defendant filed a motion for collateral relief. The Circuit Court, Dade County, No. 131990CF016875C000XX, Diane Valentina Ward, J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that *Hurst v. State*, 202 So.3d 40, which required a jury to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence.

Affirmed.

Pariente, J., filed an opinion concurring in result.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] Courts
In general;retroactive or prospective operation

Florida Supreme Court decision in *Hurst v. State*, 202 So.3d 40, in which Court held that a jury to was required to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence; defendant was sentenced to death following a jury's recommendation for death by a vote of ten to two, and his sentence became final approximately 21 years before *Hurst* was issued.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Dade County, Diane Valentina Ward, Judge—Case No. 131990CF016875C000XX

Attorneys and Law Firms

Martin J. McClain of McClain & McDermott, P.A., Wilton Manors, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Melissa J. Roca, Assistant Attorney General, Miami, Florida, for Appellee

Opinion

PER CURIAM.

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

Griffin's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Griffin's appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, Griffin responded to this Court's order to show cause arguing why Hitchcockshould not be dispositive in this case.

***238** After reviewing Griffin's response to the order to show cause, as well as the State's arguments in reply, we conclude that Griffin is not entitled to relief. Griffin was sentenced to death following a jury's recommendation for death by a vote of ten to two. Griffin v. State, 639 So.2d 966, 968 (Fla. 1994). Griffin's sentence of death became final in 1995. Griffin v. Florida, 514 U.S. 1005, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995). Thus, Hurst does not apply

retroactively to Griffin's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Griffin's motion.

The Court having carefully considered all arguments raised by Griffin, 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, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

236 So.3d 237, 44 Fla. L. Weekly S77

End of Document

Attachment B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 4, 2018

Mr. Martin J. McClain
McClain & McDermott, P.A.
141 NE 30th Street
Wilton Manors, FL 33334

Re: Michael Allen Griffin
v. Florida
Application No. 17A1206

Dear Mr. McClain:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on May 4, 2018, extended the time to and including July 2, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Clayton Higgins
Case Analyst