

DOCKET NO. 18-5174

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018**

MICHAEL ALLEN GRIFFIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

**REPLY TO RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT**

*Martin J. McClain
Fla. Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

***COUNSEL OF RECORD**

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Petitioner, **MICHAEL ALLEN GRIFFIN**, files his reply to the State's Brief in Opposition to his Petition for Writ of Certiorari under Rule 15.6 of this Court's rules.

The Petition for a Writ of Certiorari was filed on July 2, 2018. On August 3, 2018, Respondent served and filed its Brief in Opposition.

REPLY TO THE BRIEF IN OPPOSITION AND
RESPONDENT'S ASSERTED REASONS FOR DENYING THE WRIT

I.

In his petition, Petitioner set forth the following as the questions presented:¹

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 a 1990 homicide?
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 a 1990 homicide and invalidate his death sentence?

(Petition at i-ii).²

Respondent in its Brief in Opposition ignores these distinct questions presented, and instead makes up an entirely different "question presented" that omits the underlying legal issue that Petitioner has asked this Court to consider for review. Then, Respondent uses a shotgun approach to insert into its "Questions [sic] Presented for Review" a litany of inapplicable reasons for why certiorari review should be denied:

Whether this Court should deny certiorari to review the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, where the issue of retroactivity was decided as an issue of state law in a decision that does not

¹In preparing this reply to the brief in opposition, Petitioner's counsel noticed that the questions presented as they appear in the Petition contain typographical errors. As a result of those typographical error the questions presented in the Petition erroneously indicate that Petitioner has two death sentences for two 1994 homicides. In point of fact, Petitioner has one death sentence arising from a 1990 homicide. The statement of the questions presented set forth herein has been corrected to reflect that Petitioner has one death sentence arising from a 1990 homicide. Counsel apologizes for the typographical error in the Petition.

²*Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

conflict with any of this Court's precedent and which does not present a significant or unsettle issue of constitutional law worthy of certiorari review?

(BIO at i) (emphasis added).³

Respondent overlooks the fact that Petitioner is not arguing that the constitutional rulings in *Hurst v. Florida* and/or *Hurst v. State* must be applied retroactively to him.⁴ Petitioner's focus is not on a new procedural rule derived from those decisions, but on the construction of Florida's capital sentencing statute and the identification of those facts which the State must prove beyond a reasonable doubt to the satisfaction of a unanimous jury before death is a sentencing option. To be sure, the Florida Supreme Court in rendering its decision in *Hurst v. State* made constitutional rulings which were procedural in nature. However, *Hurst v. State* also addressed the statutory language setting forth Florida's substantive criminal law identifying the elements that separates first degree murder from the higher degree of murder, i.e. capital murder, for which the range of punishment includes death. *Hurst v. State* addressed both procedural and substantive matters. *See Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) ("This Court's holding that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the

³*Hurst v. Florida*, 136 S.Ct. 616 (2016).

⁴Respondent's failure to understand what Petitioner is asking this Court to review mirrors the Florida Supreme Court's failure to recognize that Petitioner's argument there was premised upon the substantive criminal law aspect of *Hurst v. State*, and not upon a procedure rule. The Florida Supreme Court has yet to see that a new penalty phase ordered on the basis of *Hurst v. State* is actually a proceeding to determine the defendant's guilt of capital murder. This is because the proceeding is to resolve the defendant's guilt of a capital murder. In these new proceedings the statutory construction that appears in *Hurst v. State* is now the governing substantive law as to 1981 homicides. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). While the State will be required to convicted Mr. Card and Mr. Johnson of having committed capital murder in 1981, the State has not been required to convicted Petitioner of capital murder as to the 1994 homicides at issue in his case before imposing a death sentences.

same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.”).

It should be noted that Arizona, both before and after *Ring v. Arizona*,⁵ required at least one aggravating circumstance to be proven by the State beyond a reasonable doubt. *See State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001) (“a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt”). The Arizona Supreme Court concluded that *Ring v. Arizona* had merely announced a new procedural rule within the State of Arizona because this Court’s decision did not change what facts had to be proven by the State beyond a reasonable doubt in order for a conviction to be returned. *State v. Towery*, 64 P.3d 828, 833 (2003) (*Ring v. Arizona* “affected neither the facts necessary to establish Arizona’s aggravating factors nor the state’s burden to establish the factors beyond a reasonable doubt.”). This Court relied upon the Arizona Supreme Court’s conclusion that *Ring v. Arizona* had not reshaped Arizona’s substantive law as to what facts that the State was required to prove beyond a reasonable doubt before death was a sentencing option. *Schririo v. Summerlin*, 542 U.S. at 354.

However in *Hurst v. State*, the Florida Supreme Court held that:

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. The existence of these statutorily identified facts is necessary under *Hurst v. State* to increase the range of punishment to include death. These facts are thus

⁵*Ring v. Arizona*, 536 U.S. 584 (2002).

elements of capital murder. Proving these facts beyond a reasonable doubt is necessary “**to essentially convict a defendant of capital murder.**” *Id.* at 53-54. *In re Winship*, 397 U.S. 358 (1970) (each element of a criminal offense must be proven beyond a reasonable doubt).

As to the individual aggravating circumstances, the State, even before *Hurst v. State*, had been required to prove the existence of the aggravating circumstances under a beyond-a-reasonable-doubt burden of proof. Pre-*Hurst v. State*, the jury was instructed that the State was required to prove each aggravator beyond a reasonable doubt; but the jury’s advisory recommendation could be returned on the basis of a majority vote. This was hardly compatible with a beyond a reasonable doubt burden of proof. As to the other elements set out in *Hurst v. State*, the State had not previously been required to prove those elements beyond a reasonable doubt, and the jury was not instructed that the State had to prove that the aggravators found to exist were sufficient to justify a death sentence nor that beyond a reasonable doubt the aggravators outweighed the mitigators.

The aspect of *Hurst v. State* on which Petitioner relies is that portion that said that the statutorily identified facts were essentially elements of capital murder, the highest degree of murder. In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), the Florida Supreme Court reaffirmed its conclusion in *Hurst v. State* that the statutorily identified facts necessary to increase the range of punishment to include a death sentence were elements of a higher degree of murder:

[O]ur retroactivity analysis in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005)] hinged upon our understanding of *Ring*’s application to Florida’s capital sentencing scheme at that time. Thus, **we did not treat the aggravators, the sufficiency of the aggravating circumstances, or the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime.** Specifically, because we were still bound by *Hildwin*, we

did not properly analyze the purpose of the new rule in *Ring*, which was to protect the fundamental right to a jury in determining **each element of an offense**.

Asay v. State, 210 So. 3d at 15-16 (emphasis added).

In *Schrivo v. Summerlin*, this Court explained:

A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. *See Bousley [v. United States]*, 523 U.S., at 620-621, 118 S.Ct. 1604.

542 U.S. at 354. Petitioner does not argue that *Hurst v. Florida* modified the elements of the substantive offense; indeed, he is not relying on *Hurst v. Florida* at all.⁶ Instead, his argument rests on the Florida Supreme Court's ruling in *Hurst v. State* in which that court found the statutorily identified facts to be elements of capital murder which must be proven beyond a reasonable doubt to the satisfaction of a unanimous jury.

Respondent seeks to escape from the implications of the Florida Supreme Court's finding that the statutorily identified facts are elements of capital murder by simply ignoring the ruling and stating “[t]hese additional requirements imposed by *Hurst v. State* are not ‘elements’ of a capital offense, contrary to Raleigh’s argument.” (BIO at 13).

Respondent seeks to avoid the implications of *Fiore v. White*, 531 U.S. 225 (2001) by just asserting “*Hurst* is distinguishable because it did not address the proof-beyond-a-reasonable-

⁶ Respondent's failure to understand the issue on which Petitioner seeks certiorari review is apparent when it asserts Petitioner's reliance on *Bousley* is misplaced. (BIO at 12). Noting that the issue in *Bousley* was “the meaning of a criminal statute enacted by Congress,” Respondent distinguishes Petitioner's circumstances saying in contrast to *Bousley*, “as explained herein, *Hurst v. Florida* announced a new procedural rule.” (BIO at 12). But, the issue that Petitioner seeks to have heard does not concern the constitutional ruling in *Hurst v. Florida*. The issue on which he asks this Court to grant review concerns the meaning of the criminal statute enacted by the Florida legislature, and the substantive law ruling in *Hurst v. State* based on that statute identifying the elements of capital murder.

doubt standard.” (BIO at 13). In making this argument, the State overlooks *Bunkley v. Florida*, 538 U.S. 835 (2003). There, this Court specifically addressed the Florida Supreme Court’s use of the *Witt* retroactivity analysis when addressing a new decision regarding the substantive law setting forth the elements of a criminal offense.⁷ In *Bunkley v. Florida*, the Florida Supreme Court’s *Witt* analysis in *Bunkley v. State*, 833 So. 2d 739 (Fla. 2002), was found wanting under *Fiore v. White* and the Due Process Clause. Respondent completely ignores this in arguing that there is no federal constitutional issue here.

The confused muddle that is the Brief in Opposition, along with the Florida Supreme Court’s steadfast refusal to hear or address Petitioner’s contention, together demonstrate why certiorari review is warranted. It falls to this Court to conduct a principled analysis of the due process implications of the Florida Supreme Court’s ruling in Petitioner’s case, as it did in *Fiore v. White* and *Bunkley v. Florida*. This Court has stepped in on a number of occasions in which Florida’s capital jurisprudence went off the rails. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Parker v. Dugger*, 498 U.S. 308 (1991); *Espinosa v. Florida*, 505 U.S. 1079 (1992); *Porter v. McCollum*, 558 U.S. 30 (2009); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review of the questions he presented in his Petition is warranted.

Respectfully submitted,

MARTIN J. McCLAIN

⁷ *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

Florida Bar No. 0754773
McClain & McDermott, P.A.
141 N.E. 30th Street
Wilton Manors, FL 33334
Telephone (305) 984-8344
martymcclain@comcast.net

COUNSEL FOR PETITIONER

Copies furnished to:

Scott A Browne
Senior Assistant Attorney General

Brian H. Zack
Assistant Attorney General

Office of the Attorney General
1 SE Third Avenue, Suite 900
Miami, FL 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 14, 2018.

MARTIN J. MCCLAIN
Fla. Bar. No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
Telephone: (305) 984-8344
martymcclain@comcast.net

COUNSEL FOR MR. GRIFFIN