DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MILFORD WADE BYRD,

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).

Chapter 2017-1, Laws of Florida, was enacted on March 13, 2017, and confirmed and incorporated into the capital sentencing scheme the decision in *Hurst v. State* and its construction of the statute and its identification the elements of capital murder.

In *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017), the Florida Supreme Court vacated a death sentence on the basis of *Hurst v. State* because all of the elements necessary to convict of capital murder had not been found proven beyond a reasonable doubt by a unanimous jury at a 1999 resentencing which was not final until after June 24, 2002. The Florida Supreme Court remanded the case for 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. In another words, at the new proceedings the jury would have to find the elements necessary to convict Mr. Card of capital murder proven beyond a reasonable doubt before the judge would be authorized to reimpose a death sentence. The homicide at issue in *Card v. Jones* was committed on June 3, 1981. *See Card v. State*, 453 So. 2d 17, 18 (Fla. 1984). The homicide at issue in Petitioner's case occurred on October 13, 1981.

In *Victorino v. State*, 241 So. 3d 48 (Fla. 2018), the Florida Supreme Court rejected an ex post facto challenge to the retrospective application of the ruling in *Hurst v. State* and the revised capital sentence statute to case in which the homicide at issue was committed in 2004, twelve years before *Hurst v. State*:

> 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. Applying the revised statute enacted on March 13, 2017 in order to conform with the ruling in *Hurst v. State*, retrospectively does not violate ex post facto because it did not alter the definition of criminal

conduct nor increase the penalty for capital murder as that offense was defined in *Hurst v. State*. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009).

Questions

1. Given that the elements of capital murder which were identified by the Florida Supreme Court in *Hurst v. State* will be applied to determine if James Card is guilty of capital murder for a homicide committed in 1981 and subject to a death sentence, can Petitioner's death sentence remain intact given that his jury did not unanimously find the State had proven all of the elements of capital murder beyond a reasonable doubt and he has not been found guilty of capital murder for a homicide committed in 1981?

2. Is the finding that the longstanding statutorily required facts necessary to authorize a death sentence are elements of capital murder in *Hurst v. State,* substantive criminal law which must be apply retroactively to Petitioner and his death sentence on a 1981 homicide when his jury did not unanimously find the elements of capital murder were not found proven beyond a reasonable doubt?

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Petitioner, **MILFORD WADE BYRD**, 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 *Byrd v. State*, 237 So.3d 922 (Fla. 2018). The opinion is attached to this Petition as Attachment A. Mr. Byrd 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 Saturday, July 28, 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 28, 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 November 12, 1981, Mr. Byrd and two co-defendants, James Endress and Ronald Sullivan, were charged by indictment with first degree murder.[1] The State's theory before the grand jury was that Mr. Byrd had hired Mr. Endress and Mr. Sullivan to kill his wife even though the police had been advised that Mr. Endress had told Debra Williams that he and Mr. Sullivan had killed Mrs. Byrd during a robbery and made no mention of Mr. Byrd being involved.[2] The State also was aware of evidence that Mr. Byrd was drinking at a bottle club at the time of his wife's murder.

In December of 1981 while the police questioned Mr. Sullivan

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[1]On October 13, 1981, Debra Byrd, Petitioner's wife, was killed in the office of the Econo Travel Motor Lodge in Tampa, Florida. Mr. Byrd and his wife were the managers of the motel. At that time, Mr. Endress and Mr. Sullivan had been residing in a room at the motel.

[2]The night auditor of a nearby Ramada Inn had been robbed at gunpoint on September 26, 1981. When Mr. Parry identified Mr. Sullivan as the man who robbed him, the police came to view Mr. Sullivan and Mr. Endress as suspects in Mrs. Byrd's murder. Mr. Sullivan was arrested and interviewed on October 27, 1981. Mr. Sullivan denied any involvement in Mrs. Byrd's murder, but said that Mr. Byrd had been looking for someone to kill his wife. In the early morning hours of October 28, the police went to Mr. Byrd's residence to arrest Mr. Byrd without an arrest warrant. After Mr. Byrd opened the door, the police entered and placed Mr. Byrd under arrest. The police discovered that a woman was with Mr. Byrd. The police understood that the woman was Mr. Byrd's girlfriend. She was asked to accompany the police to the police station. There, Mr. Byrd signed a waiver of his rights, but remained silent for nearly two hours. Aware that his girlfriend was also at the police station, Mr. Byrd finally said that he would talk if he was allowed to speak privately with his girlfriend. After speaking privately with his girlfriend, Mr. Byrd implicated himself in his wife's murder. He later claimed that he had done this in order to insure that the police would release his girlfriend.

about a number of other criminal cases in which Mr. Sullivan was either a suspect or already criminal charged, he told the police that he could give them "Wade [Byrd] and [E]ndress really good."

Mark Ober and Manny Lopez were assigned to prosecutor Mr. Byrd, Mr. Sullivan and Mr. Endress for Mrs. Byrd's murder. Linda Lathem, Mrs. Byrd's sister, approached Mr. Ober for guidance as to how she could obtain the $100,000 payout from Mrs. Byrd's life insurance policy. Mr. Ober referred her to James LaRussa, an attorney who was also Mr. Ober's brother-in-law.

In April of 1982, Mr. Sullivan was permitted to plead to second degree murder. In exchange for his agreement to testify against Mr. Byrd, the State agreed to probation for Mr. Sullivan. The State dropped Mr. Sullivan's pending armed robbery charge arising from Mr. Parry's identification of Mr. Sullivan as the man who robbed him at gunpoint, as well as a separate grand theft charge.

Mr. Byrd's trial occurred in July of 1982. The State called Mr. Sullivan to testify that Mr. Byrd hired him and Mr. Endress to kill Mrs. Byrd. Mr. Sullivan also testified that Mr. Byrd became impatient and returned to the motel and participated in the murder. The State elicited testimony from Mr. Sullivan to the effect that when the prosecutors agreed to give him probation in exchange for his testimony against, Mr. Sullivan had not yet indicated what he his testimony would be.[3]

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[3]In the State's closing, the State argued that it did not know what Mr. Sullivan's testimony would be until after it had (continued...)

Mr. Byrd's defense was that Mr. Sullivan and Mr. Endress committed the murder and that Mr. Byrd was not involved. Besides maintaining that his statement to the police was the result of his effort to shield his girlfriend, the defense called two individuals who had been in jail with Mr. Sullivan. They both testified that Mr. Sullivan had told them that Mr. Byrd was not involved in his wife's murder which Mr. Sullivan and Mr. Endress had committed.

The jury returned a verdict on July 23, 1982, finding Mr. Byrd guilty of first degree murder. At the penalty phase which was conducted on July 27, 1982, the jury was repeatedly told that its penalty phase verdict was advisory only. The jury returned an advisory death recommendation. The verdict form read that by a "majority of 12" the jury recommended a death sentence.[4]

On August 13, 1982, the judge imposed a death sentence on Mr. Byrd. Thereupon, the judge discharged Mr. Byrd's counsel. Three months later on November 15, 1982, the judge filed a written sentencing order which contained the following: "the Court finds that three aggravating circumstances exist and that

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[3](...continued)
agreed to give him probation on his plea to second degree murder. "If Mr. Sullivan had told Mr. Ober and myself, 'I did it guys, Wade Byrd didn't have anything to do with it,' we would have been bound by those plea negotiations." (R 1206).

[4]The jury's verdict did not further indicate how many of the 12 jurors had voted in favor of the death recommendation. The sentencing judge testified in 2002 that the term by "a majority of twelve" meant that the jury vote could have been simply "seven [to] five." (PCR2 1519). *See Byrd v. State*, 237 So. 3d at 923 n.1 ("The jury's vote to recommend death is unknown.").

mitigating circumstances exist which would mitigate the sentence imposed in this case by the Court."

After Mr. Byrd was convicted of first degree murder, the brother-in-law of Ober (one of the prosecutors) used the conviction on behalf of Mrs. Byrd's sister to have her given the $100,000 payout from Mrs. Byrd's life insurance policy.[5] The prosecutor's brother-in-law, Mr. LaRussa, was then paid a $16,000 contingency fee. Mr. LaRussa then gave the prosecutor, Mr. Ober, ten percent of his contingency fee, $1,600.[6]

On direct appeal, the Florida Supreme Court affirmed Mr. Byrd's conviction and death sentence by a vote of 4-2. *Byrd v. State*, 481 So. 2d 468 (Fla. 1985), *cert. denied* 476 U.S. 1153 (1986).

The Florida Supreme Court subsequently affirmed the denial of Mr. Byrd's motion for post conviction relief. *Byrd v. State*, 597 So. 2d 252 (Fla. 1992). Later, the Florida Supreme Court denied Mr. Byrd's petition for writ of habeas corpus. *Byrd v. Singletary*, 655 So. 2d 67 (Fla. 1995). When Mr. Byrd filed a successive motion for post conviction relief based on newly discovered evidence on which an evidentiary hearing was conducted, the Florida Supreme Court affirmed the denial of collateral relief. *Byrd v. State*, 14 So. 3d 921 (Fla. 2009). Later relying on *Porter v. McCollum*, 559 U.S. 30 (2009), Mr. Byrd

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[5]Mr. Byrd had been the primary beneficiary of the insurance police, and Mrs. Byrd's sister was the contingent beneficiary.

[6]In 1989, Mr. Ober testified that he sent Mrs. Byrd's sister to Mr. LaRussa because Mr. LaRussa had assisted him financially while Mr. Ober attended law.

again sought post conviction. Concluding that *Porter* was not to be applied retroactively under Florida law, the Florida Supreme Court in an unpublished order affirmed the summary denial of Mr. Byrd's second successive motion for post conviction relief. *Byrd v. State*, 118 So. 3d 807 (Fla. 2013) (Table).

B. Proceedings Giving Rise to this Petition.

On November 2, 2016, Mr. Byrd filed the motion for post conviction relief that is at issue in this petition. Initially, he raised 3 claims. The claim pertinent to this petition was Claim II of the motion which sought relief on the basis of the decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which identified the elements of capital murder that a jury had to unanimously find proven beyond a reasonable doubt before a judge was authorized to impose a death sentence. Within this claim, Mr. Byrd argued that because his jury was told its recommendation was "advisory" and the sentencing decision rested with the judge, the death recommendation was infected with a bias in favor of death given the diminution of a jury's sense of responsibility. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Byrd argued this *Caldwell* error tainted the recommendation and precluded a finding that error under *Hurst v. State* was harmless.

On March 13, 2017, Mr. Byrd amended the 3.851 motion and added a fourth claim which is not at issue in this petition.

On April 20, 2017, the circuit court orally granted Byrd's motion to amend the amended motion to include an additional claim arising from the enactment of Chapter 2017-1, Laws of Florida. On April 27, 2017, Byrd filed a supplement to the amended motion in

which he set forth Claim V.

A case management conference was held on May 24, 2017. Pertinent to this petition, Mr. Byrd argued as to Claim II and Claim V that the Florida 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* was confirmed by the Florida Legislature when Chapter 2017-1, Laws of Florida, was enacted on March 13, 2017. Mr. Byrd argued that under *Hurst v. State* and pursuant to Chapter 2017-1, the statutorily defined facts were elements of capital murder, a substantive criminal offense, and the elements had to be found to have existed at the time of the homicide at issue. However, Mr. Byrd's jury had not been instructed of the State's burden to prove beyond a reasonable doubt to the satisfaction of a unanimous jury two of the elements of capital murder: 1) the existence sufficient aggravating circumstances to justify a death sentence, and 2) the aggravating circumstances outweighed the mitigating circumstances. Even as to the aggravating circumstances themselves, the jury was not told that the jurors had to unanimously find that the State had proven each aggravating circumstances before it could be considered as established and weighed when deciding if the aggravators were sufficient and outweighed the mitigators. Mr. Byrd also noted that because his jury was told its recommendation was "advisory" in nature and that the sentencing decision rested with the judge, a death recommendation reflected a bias in favor of death due to

the diminution of the jury's sense of responsibility. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

The circuit court denied all of Mr. Byrd's claims. A timely notice of appeal was filed on September 27, 2017. After the record was filed, the Florida Supreme Court issued an order on December 13, 2017, directing Byrd to show cause "why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445."

In his response to the show cause order, Mr. Byrd argued that on the basis of *Hurst v. State*, and Chapter 2017-1, his death sentence could not stand because he had not been convicted of capital murder. In *Hurst v. State*, the Florida Supreme Court addressed the old version of § 921.141 in effect at the time of the homicide at issue in Mr. Byrd'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.[7] Because these were the

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[7]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)).

(continued...)

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 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*.

In his appeal, Mr. Byrd argued that *Hurst v. State* had identified the statutory elements of capital murder which had to have been proven by the State beyond a reasonable doubt:

> * * * If death is to be imposed, unanimous jury

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[7](...continued)
Hurst v. State, 202 So. 3d at 53.

> 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. But, he argued that his jury had not been instructed that these elements had to be proven by the State beyond a reasonable doubt. As a result, he argued that his death sentence stood in violation of *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).

In his appeal, Mr. Byrd observed that the new proceedings 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 when he committed a homicide in June of 1981. The order granting "new penalty phase" had effectively reopened the issue of the defendant's guilt as to a homicide committed several months before the one for which Mr. Byrd's was convicted. On remand the State would have to prove the elements of capital murder before Mr. Card could again receive a death sentence. *See Card v. State*, 453 So. 2d 17, 18 (Fla. 1984). In addition to Mr. Card, Paul Johnson's death sentence was vacated a new proceeding ordered at which the State will have to prove the elements of capital murder were present at the time of three homicides

committed in January of 1981. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016).[8]

In its February 2, 2018 opinion affirming the denial of Mr. Byrd's 3.851 motion, the Florida Supreme Court did not address or analyze Mr. Byrd's argument premised upon the statutory construction set forth in *Hurst v. State* and/or the statutory language set forth in Chapter 2017-1. Mr. Byrd's claims were simply denied as meritless.

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

REASONS FOR GRANTING THE WRIT

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

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 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

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

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 *Schriro v. Summerlin*, 542 U.S. 348 (2004), this Court indicated that substantive rulings regarding the scope of a criminal statute be applied retroactively:

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). **Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him.** *Bousley, supra*, at 620, 118 S.Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

Schriro, 542 U.S. at 351-52 (emphasis added) (footnote omitted).

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.

See Bunkley v. Florida, 538 U.S. 835, 841-42 (2003) ("The proper question under *Fiore* is not just whether the law changed. Rather, it is when the law changed. The Florida Supreme Court has not answered this question; instead, it appeared to assume that merely labeling L.B. as the "culmination" in the common pocketknife exception's "century-long evolutionary process" was sufficient to resolve the Fiore question. 833 So.2d, at 745. It is not. Without further clarification from the Florida Supreme Court as to the content of the common pocketknife exception in 1989, we cannot know whether L.B. correctly stated the common pocketknife exception at the time he was convicted.").

Once it is determined as to when Florida substantive law required the statutorily defined fact to treated as elements of the criminal offense of capital murder, the next step is to apply *In re Winship*. Under *Winship*, each element of a criminal offense must be found proven beyond a reasonable doubt. In Mr. Byrd's case, the jury was not told that the State bore the burden of proving the elements of capital murder beyond a reasonable doubt.

The Florida Supreme Court has made it clear that the statutorily defined facts have long been part of Florida law and necessary for a death sentence to be imposed when it rejected an

ex post facto challenge to requiring them to be proven as elements of capital murder in homicide prosecution arising from a murder that occurred 12 years before *Hurst v. State* issued and 13 years before Chapter 2017-1 was enacted. In *Victorino v. State*, the Florida Supreme Court recently held:

> 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.[9]

Because of the due process and Eighth Amendment issues arising in Florida capital cases as a result the statutory construction of the capital sentencing statute set forth in *Hurst v. State*, this Court should issue the writ. As it stands now, Mr. Byrd 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. The definition of capital murder set forth in *Hurst v. State* and appearing in Chapter 2017-1 is being applied to the criminal prosecutions of James Card and Paul Johnson as to murders committed in June and January of 1981, while it is not applied to many other cases in which death

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

sentences have been imposed for murders committed after those at issue in *Card v. Jones* and *Johnson v. State*.

In Mr. Byrd's case which arises from an October of 1981 homicide, the State was not held to prove the elements of capital murder beyond a reasonable doubt to the satisfaction of a unanimous jury. Mr. Byrd's death sentence stands even though he was not convicted of capital murder, while Mr. Card and Mr. Johnson will not receive death sentences for murders committed earlier in 1981 unless the elements of capital murder are proven beyond a reasonable doubt and their juries return verdicts in essence convicting them of capital murder.

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 1981 homicides in *Card v. Jones* and *Johnson v. State* also be applied to Mr. Byrd's case in which he received a death sentence for a 1981 homicide even though he was not convicted of capital murder.

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 Marilyn Muir Beccue, Attorney General's Office, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, on this 30th day of July, 2018.

/s/ Martin J. McClain
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Attachment A

237 So.3d 922
Supreme Court of Florida.

Milford Wade BYRD, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1733
|
[February 28, 2018]

Synopsis

Background: Petitioner moved for postconviction relief. The Circuit Court, Hillsborough County, No. 291981CF010517000AHC, Michelle Sisco, J., denied the petition. Petitioner appealed.

[Holding:] The Supreme Court held that decision of United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616, holding that Sixth Amendment required jury, not judge, to find each fact necessary to impose death sentence, did not apply retroactively to petitioner's death sentence.

Pariente, J., concurred in result with opinion.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] **Courts**
In general;retroactive or prospective operation
Criminal Law
Change in the law

Decision of the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616, which held that the Sixth Amendment required a jury, not a judge, to find each fact necessary to impose a death sentence, did not apply retroactively to postconviction relief petitioner's death sentence, where petitioner was sentenced to death following a jury's recommendation for death and sentence became final 30 years before *Hurst v. Florida* was decided. U.S. Const. Amend. 6.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge—Case No. 291981CF010517000AHC

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Opinion

PER CURIAM.

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

Byrd's motion sought relief pursuant to the United States Supreme Court's decision in ***923** *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). After this Court decided *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), Byrd responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.

After reviewing Byrd's response to the order to show cause, as well as the State's arguments in reply, we conclude that Byrd is not entitled to relief. Byrd was sentenced to death following a jury's recommendation for death. *Byrd v. State*, 481 So.2d 468, 471 (Fla. 1985).[1] Byrd's sentence of death became final in 1986. *Byrd v. Florida*, 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986). Thus, *Hurst* does not apply retroactively to

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

1 The jury's vote to recommend death is unknown. This Court's opinion on direct appeal merely states that "[t]he jury returned an advisory recommendation of the death penalty." *Byrd*, 481 So.2d at 471.

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

LABARGA, C.J., and POLSTON and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

QUINCE, J. recused.

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

237 So.3d 922, 43 Fla. L. Weekly S115

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

June 1, 2018

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

Re: Milford Wade Byrd
v. Florida
Application No. 17A1332

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 June 1, 2018, extended the time to and including July 28, 2018.

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

Sincerely,

Scott S. Harris, Clerk

by

Jacob C. Travers
Case Analyst