**DOCKET NO. 18-5441**

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

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**MILFORD WADE BYRD,**

***Petitioner*,**

**vs.**

**STATE OF FLORIDA,**

***Respondent*.**

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

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

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Petitioner, **MILFORD WADE BYRD,** 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 30, 2018. On September 4, 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.

At its core, the petition for writ of certiorari concerns the due process and Eighth Amendment implications of the Florida Supreme Court's construction of Florida's death penalty statute set forth in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).[1] Within that context, Petitioner identified forth the following as the questions presented:

> 1. Given 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 sentences 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 appl[ied] retroactively to Petitioner and his death sentence on a 1981 homicide when his jury did not unanimously find the elements of capital murder [ ] proven beyond a reasonable doubt?

(Petition at i-ii).[2]

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[1]For unknown reasons, Respondent spends an inordinate amount of time addressing the penalty phase jury verdict in Petitioner's case and the language that the death recommendation was "by a majority of 12." As noted in the Petition, the sentencing judge testified in 2002 that the phrase "by a majority of twelve" meant that the jury vote for a death recommendation could have been "seven [to] five." (PCR2 1519). The Florida Supreme Court in the decision at issue in Petitioner's petition found as a matter of fact that "[t]he jury's vote to recommend death is unknown." *Byrd v. State*, 237 So. 3d 922, 923 n.1 (Fla. 2018). At this point, the Florida Supreme Court's statement controls, not Respondent's contrary view of how the phrase "by a majority of twelve" should be interpreted. (BIO at 5).

[2]In preparing this reply to the brief in opposition, Petitioner's counsel noticed that the second question presented as set out in the Petition contained typographical errors. The statement of the second question presented set forth herein has been corrected as noted by the use of

(continued...)

Respondent in its Brief in Opposition ignores Petitioner's statement of the questions presented, and instead makes up an entirely different "question presented" which seems to assume that Petitioner's challenge to his death sentence rests on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Sixth Amendment. However, Petitioner's challenge to his death sentence rests upon the construction of the death penalty statute in *Hurst v. State* and the resulting implications arising from the Due Process Clause requirement that elements must be proven beyond a reasonable doubt as discussed in *In re Winship*, 397 U.S. 358 (1970), and *Fiore v. White*, 531 U.S. 225 (2001), and from the Eighth Amendment requirement that jurors know the importance of their decision as discussed in *Caldwell v. Mississippi*, 472 U.S. 320 (1985).[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

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[2] (...continued)
brackets. Counsel apologizes for the typographical error in the Petition.

[3] In the section of the Brief in Opposition labeled "Constitutional and Statutory Provisions Involved," Respondents states that it "accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved." Yet, the entirety of the Brief in Opposition is focused on the retroactivity of *Hurst v. Florida*, a decision that rests on the Sixth Amendment. Petitioner did not cite, let alone rely on, *Hurst v. Florida* in his petition, nor did he list the Sixth Amendment as a constitutional provision that was involved in the consideration of his petition.

[4] Respondent'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 to that court rested on the substantive criminal law aspect of *Hurst v. State*, and not upon a procedure rule. The Florida Supreme Court has yet to acknowledge that the new penalty phases ordered on the basis of *Hurst v. State* are actually proceedings to determine the defendants' guilt of capital murder. This is because the proceedings are to resolve whether the State can prove the elements of capital murder beyond a reasonable doubt. In these new proceedings the statutory construction that appears in *Hurst v. State* will be the governing substantive law even 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
(continued...)

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 construed the statutory language setting forth Florida's substantive criminal law and identified the elements that separate 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) ("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*, 523 U.S., at 620-621, 118 S.Ct. 1604.").[5]

It should be noted that Arizona law, both before and after *Ring v. Arizona*,[6] required at least one aggravating circumstances 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

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[4] (...continued)
murders in 1981before death sentences will be permissible, the State has not been required to convicted Petitioner of capital murder as to the 1981 homicide at issue in his case. Though Petitioner has not been convicted of capital murder, his death sentence remains intact.

[5] In its brief in opposition, Respondent has relied upon *Schriro v. Summerlin* without acknowledging the significant difference between Arizona law as set forth in *State v. Towery*, 64 P.3d 828, 833 (2003), and Florida law as set forth in *Hurst v. State*.

[6] *Ring v. Arizona*, 536 U.S. 584 (2002).

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 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. Petitioner's jury was not instructed that the State had to prove beyond a reasonable doubt that the aggravators found to exist were sufficient to justify a death sentence nor that beyond a reasonable doubt the aggravators outweighed the mitigators. *See In re Winship*.

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).

Petitioner did not and 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.[7] Instead, his argument

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[7]Respondent's failure to understand the issue on which Petitioner seeks certiorari review is apparent when it asserts that the Florida Supreme Court use of the word "element" in *Hurst v. State* was rhetorical because the Florida Supreme Court lacks the authority "to define the elements of criminal offenses." (BIO at 13). However, the Florida Supreme Court in *Hurst v.*

(continued...)

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 due process implications of the Florida Supreme Court's finding that the statutorily identified facts are elements of capital murder by ignoring the ruling and stating "[t]he fact that the court analogized a critical factual finding with an element did judicially transform the aggravator into an actual element of the crime." (BIO at 13).

Respondent avoids the implications of *Fiore v. White*, 531 U.S. 225 (2001) by asserting "neither the Florida Supreme Court, nor this Court, has the authority to enact or amend legislation or to define the elements of criminal offenses." (BIO at 13). In making this argument, the State overlooks *Bunkley v. Florida*, 538 U.S. 835 (2003).[8] 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. *See Witt v. State*, 387 So. 2d 922 (Fla. 1980). 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*

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[7](...continued)
*State* quite plainly did in fact identify the elements of the criminal offense of capital murder, and subsequently the Florida legislature confirmed the Florida Supreme Court's ruling when it revised the capital sentencing statute in accord with *Hurst v. State*.

[8]Respondent also overlooks this Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), and its decision in *Fiore v. White*, 531 U.S. 225 (2001).

Respondent also overlooks a number of Florida Supreme Court decisions that changed the elements of a criminal offense through statutory construction. *See Delgado v. State*, 776 So. 2d 233 (Fla. 2000); *Hayes v. State*, 750 So. 2d 1 (Fla. 1999); *Thompson v. State*, 695 So. 2d 691 (Fla. 1997).

and the Due Process Clause. Respondent completely ignores this. The Brief in Opposition does not mention *Fiore v. White*, *In re Winship*, or the Due Process Clause.

Respondent's refusal to actually address the constitutional issues Petitioner has raised in this Court, along with the Florida Supreme Court's steadfast refusal to hear or address Petitioner's Due Process Clause and Eighth Amendment arguments, 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). This Court sooner or later is going to have to once again address what the Florida Supreme Court is refusing to address, when did Florida substantive law require the State prove the elements of capital murder beyond a reasonable before a death sentence could lawfully be imposed.

## CONCLUSION

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

Respectfully submitted,

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**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 24, 2018.

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