DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JOSE ANTONIO JIMENEZ,

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).

(Emphasis added). Chapter 2017-1, Laws of Florida, was enacted on March 13, 2017. It confirmed and incorporated into Florida's capital sentencing scheme the ruling in *Hurst v. State* and its construction of the statute and its identification of 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. The homicide at issue in *Card* occurred in 1981, and the conviction of first degree murder was final in 1984. *Card v. State*, 453 So. 2d 17, 18 (Fla. 1984). However, the death sentence was not final until

June 28, 2002. In *Card v. Jones*, the case was remanded for a new proceeding at which a jury will have to unanimously find the State proved the elements of capital murder beyond a reasonable doubt before a death sentence can be reimposed. In other words, the jury will have to convict Mr. Card of capital murder, a higher degree of murder than first degree murder. Only if the jury finds that the State carried its burden will the sentencing judge be authorized to consider death as a sentence as to the 1981 homicide at issue.

In contrast to *Card v. Jones*, the homicide at issue in Petitioner's case occurred in 1992, eleven years later. Mr. Jimenez stands convicted of first degree murder, not capital murder. The Florida Supreme Court has refused to require the State to obtain a conviction of capital murder in Petitioner's case and has left the death sentence intact even though it outside the range of punishment for first degree murder.

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 sentencing statute made by a defendant accused of committing a homicide in 2004:

> 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, 241 So. 3d at 50. The Florida Supreme Court held that the revised statute enacted on March 13, 2017 which conformed to its 2016 ruling in *Hurst v. State*, was retrospectively applicable to a 2004 homicide and not an unconstitutional ex post facto law because the revised statute did not alter the definition of the criminal conduct nor increase the penalty for capital murder as that offense was defined in *Hurst v. State*.

Questions

1. Given that the elements of capital murder set out by the Florida Supreme Court in *Hurst v. State* will govern as to whether James Card is guilty of capital murder when he committed a 1981 homicide and can receive a death sentence, can Petitioner's death sentence remain intact even though his jury was not instructed that the State had to prove all of the elements of capital murder beyond a reasonable doubt before it could return a death recommendation and authorize a death sentence on a homicide committed in 1992?

2. Is the finding in *Hurst v. State* that the longstanding statutorily required facts necessary to authorize death as a sentence are elements of the criminal offense of capital murder, a higher degree of murder for which death is an authorized sentence, substantive criminal law which under due process must be apply retrospectively to Petitioner and his death sentence for a 1992 homicide?

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Petitioner, **JOSE ANTONIO JIMENEZ**, 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 OPINION BELOW

The Florida Supreme Court's opinion appears at *Jimenez v. State*, 247 So. 3d 395 (Fla. 2018). The opinion is attached to this Petition as Attachment A.

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 June 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.

STATEMENT OF THE CASE

Jose Jimenez was charged by indictment on October 21, 1992, in Dade County, Florida with one count of first degree murder and one count of burglary with an assault (R 1-2). The criminal offenses were alleged to have occurred on October 2, 1992. Mr. Jimenez's trial began on October 3, 1994, and on October 6, 1994,

the jury found Mr. Jimenez guilty on both counts (T. 957).

On November 10, 1994, a penalty phase proceeding was held. In the State's closing, the prosecutor told Mr. Jimenez's jury that:

> People formed a society and we developed rules in that society, and if there is one universal rule, it's against the killing, the deliberate killing of one another. And if someone violates that rule they should face the death penalty, and we're not here to discuss the issue of the death penalty. ***Our legislature made a decision for you, like it or not***, and no one wants to participate in a process where a life will be taken. We're taught it is wrong.
>
> It's not an easy task we're asking you to do. We're not asking you to do the easiest thing. We're asking you to do the right thing. You all took an oath to follow the law, and you promised you would follow the law, and whether or not you like the law, and as in jury selection, people feel that they like the law, but they really don't like it, when it comes down to it.
>
> If you find the aggravating circumstances outweigh the mitigating circumstances ***there's only one recommendation you can come back with. The death penalty has been imposed in this case by the actions of this defendant*** upon Phyllis Minas, a victim who was not protected by the law, lawyer, or Court, or legal safeguard. A victim not given an opportunity to plead her case or present to you mitigating factors.
>
> * * *
>
> ***There is only one appropriate punishment*** when you weigh the aggravating, the four aggravating factors against the mitigation you heard during the course of this trial today.
>
> ***There is but one recommendation that you should impose*** and that is the death penalty.

(T. 1094-95, 1097) (emphasis added). After hearing the prosecutor's argument that Florida's legislature had decided that a death recommendation was mandated in Mr. Jimenez's case, the jury returned a unanimous death recommendation (R. 487).

On December 14, 1994, the judge followed the jury's death recommendation and imposed a sentence of death on the first degree murder conviction (R. 529; T. 1138). The court found four aggravating factors, one statutory mitigator and two nonstatutory mitigators (R. 529; T. 1138).

On direct appeal, the Florida Supreme Court affirmed the judgment and sentence of death. *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997), *cert. denied*, 523 U.S. 1123 (1998). The court rejected Mr. Jimenez's challenge to the sufficiency of the evidence supporting the burglary conviction, stating, "[n]either forced entry nor entry without consent are requisite elements of the burglary statute." *Id.* at 441. The court also found the use of the burglary conviction as an aggravator was proper. *Id.*[1]

On January 31, 2000, a motion to vacate pursuant to Rule 3.851 was filed in Mr. Jimenez's case (1PC-R. 29-36). The motion was later amended, and on June 8, 2000, the circuit court entered its order denying relief (1PC-R. 91). On appeal, the Florida Supreme Court affirmed. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001), *cert denied*, 535 U.S. 1064 (2002).

On December 11, 2002, Mr. Jimenez filed a petition for writ of habeas corpus in the Florida Supreme Court. The petition presented the Florida Supreme Court with a number of issues, including the argument that Florida's capital sentencing statute

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[1]Further, the Florida Supreme Court found Mr. Jimenez's arguments that the prosecutor's penalty phase closing argument violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Campbell v. State*, 679 So. 2d 720 (Fla. 1996), were unpreserved. *Jimenez*, 703 So. 2d at 442.

violated *Ring v. Arizona*, 536 U.S. 584 (2002).[2]

On June 10, 2003, the Florida Supreme Court denied the petition stating: "The Petition for Writ of Habeas Corpus, or in the Alternative Petition Seeking to Invoke This Court's All Writs Jurisdiction is hereby denied." *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003). A rehearing motion was denied on November 14, 2003.

On May 24, 2004, Mr. Jimenez filed another petition for writ of habeas corpus in the Florida Supreme Court which relied upon new case law pertinent to Mr. Jimenez's burglary conviction. On March 18, 2005, the Florida Supreme Court denied the petition in an unpublished order and did not provided any explanation of the court's reasoning.

On January 20, 2004, Mr. Jimenez sought federal habeas relief in the federal district court. The petition was denied on January 30, 2006. Mr. Jimenez appealed, and the Eleventh Circuit Court of Appeals affirmed on March 23, 2007. *Jimenez v. Florida Dep't of Corrections*, 481 F.3d 1337 (11th Cir. 2007). Mr. Jimenez's petition for certiorari review was denied by this Court

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[2]Jimenez specifically argued that "the factual determination of 'sufficient aggravating circumstances' at the sentencing is the finding of those additional facts that are necessary" before a death sentence is authorized. (Pet. at 47). He noted: "This Court has long held that §§ 775.082 and 921.141 do not allow the imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *Dixon v. State*, 283 So. 2d 1, 7 (Fla. 1973)." (Pet. at 48). Jimenez argued that under *Ring* "[t]he full panoply of rights associated with trial by jury must therefore attach to the finding of 'sufficient aggravating circumstances.'" (Pet. at 49). Jimenez also asserted that the error was not harmless due to a unanimous death recommendation given that the jury had been told that a vote to recommend death had been mandated by the legislature in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 328-29(1985).

on November 13, 2007. *Jimenez v. McDonough*, 552 U.S. 1029 (2007).

Mr. Jimenez filed a second Rule 3.851 motion on April 28, 2005, which included claims based on *Brady* and ineffective assistance of counsel (2PC-R. 68-93). The motion was summarily denied on September 9, 2005, and rehearing was denied on November 7, 2005. On appeal, the Florida Supreme Court affirmed. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008). Rehearing was denied on January 29, 2009.

On November 29, 2010, Mr. Jimenez filed a third Rule 3.851 motion. It was premised on the ruling in *Porter v. McCollum*, 558 U.S. 30 (2009). The motion was denied on February 11, 2011 (3PC-R. 134-40).

On March 20, 2013, Mr. Jimenez filed a fourth Rule 3.851 motion based on the decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). The circuit court denied the motion on April 25, 2013, and it denied rehearing on June 10, 2013 (3PC-R. 211-13, 274-75). On appeal, the Florida Supreme Court affirmed in an unpublished order. Mr. Jimenez's petition for certiorari review was denied by this Court on March 30, 2015. *Jimenez v. Florida*, 135 S.Ct. 1712 (2015).

On January 11, 2017, Mr. Jimenez filed a fifth Rule 3.851 motion on the basis of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The motion was amended to also rely on the March 13, 2017 enactment of Chapter 2017-1, Laws of Florida. As will be explained in more detail below, Mr. Jimenez's motion was denied. On appeal, the Florida Supreme Court affirmed. *Jimenez v. State*, 247 So. 3d 395 (Fla.

2018). It is this decision by the Florida Supreme Court that is the subject of this petition.

On July 18, 2018, the Governor signed a death warrant setting Mr. Jimenez's execution for August 14, 2018.

Mr. Jimenez filed a sixth postconviction motion on July 24, 2018, and he filed a Rule 3.800(a) motion on July 29, 2018. The circuit court denied both motions; the 3.800(a) was denied on July 30, and a rehearing motion as to that ruling was denied on July 31, while the 3.851 was denied on July 31, 2018. Mr. Jimenez appealed, and as of the time of this filing, the appeal is still pending.

Mr. Jimenez filed a seventh postconviction motion on August 6, 2018. The circuit court denied the motion on August 9, 2018. Mr. Jimenez appealed. A stay of execution was entered on August 10, 2018, and full briefing was ordered on an expedited schedule. The reply brief was filed on August 28,, 2018. At this time, the appeal is still pending.

FACTS RELEVANT TO QUESTIONS PRESENTED

On January 11, 2017, Mr. Jimenez filed the motion for post conviction relief that is at issue in this petition. Initially, Mr. Jimenez raised four claims. The claim pertinent to here was Claim II of the motion. It was premised upon the decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There, the statutorily identified facts necessary for the range of punishment to include death as a sentencing option were found to be elements of the highest degree of murder, i.e. capital murder. Given that the Due Process Clause requires the jury to be instructed that the State

bears the burden of proving all of the elements of a criminal offense beyond a reasonable, Mr. Jimenez argued his due process rights were violated because his jury was not so advised during his penalty phase. The jury was not told that the State had to prove beyond a reasonable doubt that aggravating circumstances were sufficient to justify a death sentence. Instead, the jury was told its recommendation was "advisory" and the sentencing decision rested with the judge. Besides the due process violation, this also created Eighth Amendment error because 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). Mr. Jimenez argued this *Caldwell* error compounded the due process violation and precluded a finding that the due process error was harmless.

On November 3, 2017, Mr. Jimenez's motion was amended with a fifth claim based upon the March 13, 2017 enactment of Chapter 2017-1, Laws of Florida. Mr. Jimenez argued 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. Jimenez 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. Jimenez'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 of 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 it 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.

The circuit court denied all of Mr. Jimenez's claims on November 28, 2017. A notice of appeal was filed on December 26, 2017. On April 2, 2018, the Florida Supreme Court ordered Mr. Jimenez to show cause as to "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, filed on May 14, 2018, Mr. Jimenez argued that under *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 discussed the old version of § 921.141 which was in effect at the time of the 1992 homicide at issue in Mr. Jimenez's case. As to § 921.141, the court 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.[3] Because these statutorily defined facts were required for the range of punishment to be increased to include death, proving them was necessary **"to essentially convict a defendant of capital murder."** (Emphasis added). Thus, the facts were elements of the substantive criminal offense that the court referred to as 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

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

> 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.

> 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 (emphasis added).

In his appeal, Mr. Jimenez also argued that *Hurst v. State* had identified the statutory elements of capital murder which under due process had to have been proven by the State 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. Mr. Jimenez's jury had not been instructed that all of the elements of capital murder had to be proven by the State beyond a reasonable doubt. As a result, Jimenez 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).

Further, in his appeal Mr. Jimenez observed that the new proceedings ordered in *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), would functionally be a trial of whether Card was guilty of

capital murder when he committed a homicide in June of 1981. The order granting a "new penalty phase" had effectively reopened the issue of the defendant's guilt as to a homicide committed years before the one for which Mr. Jimenez 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 and 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).[4]

On June 28, 2018, the Florida Supreme Court issued an order affirming. *Jimenez v. State*, 247 So. 3d 395 (Fla. 2018). The Florida Supreme Court did not address or analyze Mr. Jimenez'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. Jimenez's claims were simply denied as meritless.

Subsequently, the Florida Supreme Court struck Mr. Jimenez's motion for rehearing without explanation.

REASONS FOR GRANTING THE WRIT

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

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

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).

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 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 should 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 facts to be 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. Jimenez'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 a 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.[5]

Because of the due process and Eighth Amendment issues arising in Florida capital cases as a result of 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. Jimenez 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 sentences have been imposed for murders committed after those at issue in *Card v. Jones* and *Johnson v. State*.

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

In Mr. Jimenez's case which arises from a 1992 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. Jimenez'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 that the substantive criminal law set forth in *Hurst v. State* and applied to 1981 homicides in *Card v. Jones* and *Johnson v. State* should also be applied to Mr. Jimenez's case in which he received a death sentence for a 1992 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 electronic service to Lisa-Marie Lerner and Melissa Roca Shaw, Office of the Attorney General, 1515 No. Flagler Drive, Ninth Floor, West Palm Beach, FL 33401, on this 23rd day of September, 2018.

/s/ Martin J. McClain
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Attachment A

247 So.3d 395
Supreme Court of Florida.

Jose Antonio JIMENEZ, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–2272
|
[June 28, 2018]

Synopsis

Background: Defendant sought collateral relief after his death sentence was affirmed on appeal, 703 So.2d 437. The Circuit Court, Miami–Dade County, No. 131992CF0341560001XX, Richard L. Hersch, J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that defendant was not entitled to collateral relief under *Hurst v. State*, 202 So.3d 40.

Affirmed.

Pariente, J., concurred in result and filed opinion.

Canady, J., concurred in result.

West Headnotes (1)

[1] Courts
In general;retroactive or prospective operation

Decision of *Hurst v. State*, 202 So.3d 40, did not apply retroactively to defendant's death sentence, and thus defendant was not entitled to collateral relief from death sentence under *Hurst*, where defendant was sentenced to death following jury's recommendation for death by unanimous vote, and his death sentence became final in 1998.

Cases that cite this headnote

*396 An Appeal from the Circuit Court in and for Miami–Dade County, Richard L. Hersch, Judge—Case No. 131992CF0341560001XX

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 Donna M. Perry, Assistant Attorney General, West Palm Beach, Florida, for Appellee

Opinion

PER CURIAM.

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

Jimenez'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). Jimenez responded to this Court's order to show cause arguing why *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), should not be dispositive in this case.

After reviewing Jimenez's response to the order to show cause, as well as the State's arguments in reply, we conclude that Jimenez is not entitled to relief. Jimenez was sentenced to death following a jury's unanimous recommendation for death. *Jimenez v. State*, 703 So.2d 437, 438 (Fla. 1997). His sentence of death became final in 1998. *Jimenez v. Florida*, 523 U.S. 1123, 118 S.Ct. 1806, 140 L.Ed.2d 945 (1998). Thus, *Hurst* does not apply retroactively to Jimenez's sentence of death. *See Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Jimenez's motion.

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

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

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

CANADY, J., concurs 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*. *Id.* at 220–23 (Pariente, J., dissenting). Of course, if *Hurst* [1] applied to ***397** Jimenez's case, he would not be entitled to relief based on the jury's unanimous recommendation for death, coupled with the absence of any stricken aggravating factors. *Jimenez v. State*, 703 So.2d 437 (Fla. 1997); *See Davis v. State*, 207 So.3d 142, 174–75 (Fla. 2016).

1 *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017).

All Citations

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