**DOCKET NO. 18-6115**

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

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**JOSE ANTONIO JIMENEZ,**

***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, **JOSE ANTONIO JIMENEZ,** 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.

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

### *A. Respondent Misstates The Question Presented By Petitioner*

To be clear, neither *Hurst v. Florida*, 136 S.Ct. 616 (2016), nor its retroactivity are matters on which Petitioner is seeking certiorari review. As to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Petitioner presents the question of whether the Due Process Clause requires the Florida

Supreme Court's construction of Fla. Stat. § 921.141 in *Hurst v. State*, 202 So. 3d 40 (2016), to be applied in Mr. Jimenez's case under *Fiore v. White*, 531 U.S. 225 (2001), and *In re Winship*, 397 U.S. 358 (1970). *See Bunkley v. Florida*, 538 U.S. 835 (2003). While the construction of § 921.141 is a question of state law, how and to whom a state's substantive criminal law defining a criminal offense is applied must comport with the Due Process Clause of the Fourteenth Amendment under *Fiore* and *Winship*. A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is substantive law. It is not a procedural rule. The analyses used to determine when a new procedural rule is to be applied retroactively do not apply to the issue Petitioner raises. *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[B]ecause *Teague[v. Lane*, 489 U.S. 288 (1989)] by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress."); *Thompson v. State*, 887 So. 2d 1260, 1263–64 (Fla.2004) ("[T]he question of retroactivity under *Witt* is not applicable to this case because we are examining a change in the statutory law of this state not a change in decisional law emanating from this Court or the United States Supreme Court").

In *Hurst v. State*, the Florida Supreme Court held that the elements of capital murder included, not just the finding of one aggravating factor, but also a finding that the aggaravting factors found are sufficient to justify the imposition of a death sentence, and a finding that the aggravating factors found outweigh the mitigating factors presented by the defense. Because the Florida Supreme Court determined that these were elements that had to be found before death was an available sentence, the Florida Supreme Court held that the jury had to unanimously find that the State had proven them beyond a reasonable doubt. Mr. Jimenez's petition is not asking

this Court to address the retroactivity of the Sixth Amendment ruling in *Hurst v. Florida*, 136 S.Ct. 616 (2016), as Respondent asserts. The issues he raises does not concern the Sixth Amendment.

***B. Respondent's Contention That This Court Lacks Jurisdiction***

Respondent contends that this Court lacks jurisdiction because the issue raised by Petitioner is a matter of state law. Respondent's contention rests on its misstatement of the question presented and its belief that Petitioner is seeking retroactive application of a procedural rule. While the Florida Supreme Court's construction of § 921.141 is a matter of state law, how and to whom it applies when the ruling identifies the elements of a criminal offenses must comport with the Due Process Clause. Here, how and to whom the Florida Supreme Court's construction of § 921.141 applies conflicts with *Fiore v. White* and *In re Winship*.

***C. Respondent's Mischaracterization of the Issue Before the Court***

Respondent not only mischaracterizes the issue Petitioner raises in his Petition, but also what he raised in the Florida Supreme Court. The claims that Petitioner presented to the Florida Supreme Court did not include a claim or argument based on *Hurst v. Florida*. Though Petitioner in his Rule 3.851 motion filed on January 12, 2017, had included as one of his four claims, his assertion that his death sentence stood in violation of the Sixth Amendment under *Hurst v. Florida*, he had abandoned that claim by the time he appealed to the Florida Supreme Court. He also did not pursue on appeal a second claim from the 3.851 motion which had challenged the failure to apply *Hurst v. Florida* to death sentence which were final before June 24, 2002.

While his 3.851 motion was pending in the circuit court, Chapter 2017-1, Laws of Florida was enacted on March 13, 2017. It significantly amended § 921.141 in the wake of *Hurst v.*

*Florida*. Petitioner was permitted to amend his 3.851 motion to include a claim based on the enactment of Chapter 2017-1. This claim and his claim based on the Florida Supreme Court's new construction of the capital sentencing statute set out in *Hurst v. State*, were pursued in the Florida Supreme Court. Petitioner argued that the new statutory construction in *Hurst v. State* and confirmed in Chapter 2017-1 established the elements of capital murder under Florida's substantive criminal law.[1] As such, Petitioner argued that this substantive criminal law had to be applied in his case under the Due Process Clause for the reasons set out in *Fiore v. White* and *In re Winship*. He also cited *Bousley v. United States*, 523 U.S. 614 (1998).

In addition, Petitioner also relied upon the Florida Supreme Court's holding in a number of cases in which death sentences were vacated on remand that the statutory construction set out in *Hurst v. State* would govern at the new "penalty phase" proceedings ordered, even in cases in which the murders at issue had been committed in 1981, more than ten years before the murder for which Petitioner received a death sentence. *See Card v. Jones*, 219 So. 3d 47 (2017); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). Petitioner argued that under *Hurst v. State* and the revised § 921.141, the new "penalty phases" ordered in *Card* and *Johnson* were proceedings to assess a defendant's guilt of capital murder. A unanimous jury would have to find that the State had proven beyond a reasonable doubt the elements of capital murder, i.e. at the time of the 1981

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[1]In Respondent's pleadings below, it did at one point address Petitioner's claim and argue that the Florida Supreme Court in *Hurst v. State* used the word "elements" merely to analogize the statutorily identified facts to elements. "The fact that the Court analogized a critical sentencing factual finding with an element did not turn the sentencing factor into an actual element of the crime." State's reply to response to show cause at 4. "Again, the generic use of the word 'element' in those discussions does not turn a jury's factual finding into an element of the offense itself. In a first-degree murder charge, the elements include facts like a person is dead and the criminal cause of death." *Id*. at 5. However, the Respondent's claim does not square with Justice Canady's spirited dissent in *Hurst v. State*, 202 So. 3d at 77, 82 (Canady, J., dissenting).

homicides: 1) there were aggravating factors; 2) those aggravating factors were sufficient to justify a death sentence; and 3) the aggravating factors found to exist at the time of the 1981 homicides outweighed the mitigating circumstances presented by the defense.

Below, Respondent mostly argued, as it does here, that Petitioner was seeking the retroactive benefit of the procedural rule set forth in *Hurst v. Florida*. Petitioner replied that was not his argument. Instead, he explained:

> The identification of the elements of a criminal offense is substantive law and a legislative function. When a court construes a statute and identifies **the elements of a statutorily defined criminal offense, the ruling constitutes substantive law** and dates to the statute's enactment. *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).

(Reply to State's reply to response to show cause order at 3). Since the Florida Supreme Court had simply identified the elements from the face of the statute, Petitioner argued under *Fiore v. White* his death sentence violated due process.

Respondent asserts that the retroactivity of *Hurst v. Florida* was decided entirely as a matter of state law in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and that the Florida Supreme Court followed its ruling in *Asay* when it rejected Petitioner's claim because his death sentence became final before June 24, 2002. (BIO at 12). However, this assertion is not relevant to what Petitioner has raised in his Petition seeking certiorari review.

### *D. Reynolds v. Florida, _ S.Ct. _, 2018 WL 59133158 (Nov. 13, 2018)*

Petitioner is aware of Justice Breyer's recent statement in *Reynolds v. Florida*, _ S.Ct. _, 2018 WL 5913358 (Nov. 13, 2018) that this Court has recently been inundated with cert petitions from individuals on Florida's death row challenging the Florida Supreme Court's refusal to grant them the retroactive benefit of *Hurst v. Florida*. But, that is not what is present by Petitioner. *Reynolds v. Florida*, 2018 WL 5913358 at *1 ("This case, along with 83 others in which the Court has denied certiorari in recent weeks, asks us to decide whether the Florida Supreme Court erred in its application of this Court's decision in *Hurst v. Florida*, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).").That many others may have asked this Court to review and address the retroactivity of *Hurst v. Florida* and/or the Florida Supreme Court's failure to grant that decision full retroactive application, should not obscure what Petitioner asks this Court to address and decide.

Justice Breyer in his statement in *Reynolds* also noted: "I believe the retroactivity analysis here is not significantly different from our analysis in *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), where we held that *Ring* does not apply retroactively. Although I dissented in *Schriro*, I am bound by the majority's holding in that case." *Reynolds v. Florida*, 2018 WL 5913358 at *1. The linkage seen between *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, while certainly understandable, should not be permitted to obscure the vast differences between the Arizona reaction to *Ring* and the changes Florida made to its substantive criminal law in the wake of *Hurst v. Florida*.

First, the statute at issue in *Ring* and the statute at issue in *Florida* diverged as to what fact or facts had to be found over and above the conviction of first degree murder to render a

capital defendant death eligible. As explained in *Ring*, Arizona law only required the finding of one aggravating circumstance beyond a reasonable doubt. As this Court noted in *Hurst*, Florida's statute identified a number of aggravating circumstances and required a fact to be found in addition, i.e. whether sufficient aggravating factors existed to justify a death sentence before a judge could imposed a death sentence. One aggravating factors was not necessarily enough.

Second, the Arizona Supreme Court's response to *Ring* was to see it as having limited effect. The Arizona Supreme Court noted that the Arizona Legislature after *Ring* issued rewrote the statute to have the jury, instead of the judge, determine whether one aggravating circumstance had been proven beyond a reasonable doubt, and if so, decide what sentence to impose. *State v. Ring*, 65 P.3d 915, 928 (Ariz. 2003) (**The new sentencing statute made "no change to the punishment attached to first degree murder. The new sentencing statutes added no new element, or functional equivalent of an element, to first degree murder**.") (emphasis added). The Arizona Supreme Court viewed *Ring* as purely a procedural decision requiring the jury, instead of the judge, to decide if one aggravator had been proven beyond a reasonable doubt. *State v. Towery*, 64 P.3d 828, 833 (Ariz. 2003) (*Ring* merely "altered who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings."). The Arizona Supreme Court ruled that no one with a final death sentence was entitled to retroactive benefit from the decision.

In Florida, the reaction was quite different. In analyzing the impact of *Hurst v. Florida*, the Florida Supreme Court noted that this Court had receded from *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), the two decisions had the Florida

Supreme Court had to find that *Ring v. Arizona* was not applicable to Florida's capital sentencing scheme. *Hurst v. State*, 202 So. 3d at 44.

The Florida Supreme Court held cornerstones of its own jurisprudence were invalidated:

> The Supreme Court's ruling in Hurst v. Florida also abrogated this Court's decisions in *Tedder v. State*, 322 So.2d 908 (Fla.1975), *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), *Blackwelder v. State*, 851 So.2d 650 (Fla.2003), and *State v. Steele*, 921 So.2d 538 (Fla.2005), precedent upon which this Court has also relied in the past to uphold Florida's capital sentencing statute.

*Hurst v. State*, 202 So. 3d at 44.

The Florida Supreme Court next looked to Florida's capital sentencing statute and held that the facts identified therein which a judge was required to find before he could impose a death sentence were elements of capital murder and would now have to be found by a jury. *Hurst v. State*, 202 So. 3d at 53 ("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."). The Florida Supreme Court then held that because Florida law required elements to be found proven by a unanimous jury, the statutorily identified facts were elements to be found a unanimous jury. *Id*. at 54 ("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.").[2] The Florida Supreme

[2]The same day that the Florida Supreme Court issued *Hurst v. State*, it also issued *Perry v. State*, 210 So. 3d 630 (Fla. 2016). At issue in *Perry* was whether the enactment of Chapter 2016-13, Laws of Florida, on March 6, 2016 applied in pending murder cases in which the homicide at issue occurred before Chapter 2016-13 was enacted. In addressing Chapter 2016-13 which was (continued...)

Court acknowledge it had not previously recognize these facts as elements. *Asay v. State*, 210 So. 3d 1, 15-16 (Fla. 2016) (noting it had not previously "treat[ed] 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."). In Florida, the elements of capital murder changed.

The Florida Supreme Court had regarded the existence one aggravating factors as all that was necessary to authorize the imposition of death. In *State v. Steele*, a decision specifically identified in *Hurst v. State* as abrogated, the Florida Supreme Court held:

> Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death

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[2](...continued)
the Florida Legislature's response to *Hurst v. Florida*, the Florida Supreme Court addressed the changes that Chapter 2016-13 made to Fla. Stat. § 921.141, and found that what the jury was required to find before death became an authorized sentence included: "whether there are sufficient aggravating factors to outweigh the mitigating circumstances in order to impose death. The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death." *Perry v. State*, 210 So. 3d at 638. As a result, the Florida Supreme Court held that "the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." *Id*. at 633. Because Florida law had long required the jury had to be unanimous in findings the elements of a criminal offense to have been proven by the State beyond a reasonable doubt, the Florida Supreme Court in *Perry* concluded that the provision in Chapter 2016-13 permitting a less than unanimous jury was unconstitutional under "Florida's state constitutional right to trial by jury and our Florida jurisprudence...." *Perry v. State*, 210 So. 3d at 640. As a result, the Florida Supreme Court held:

> The Act, however, is unconstitutional because it requires that only ten jurors recommend death as opposed to the constitutionally required unanimous, twelve-member jury. Accordingly, it cannot be applied to pending prosecutions.

*Perry v. State*, 210 So. 3d at 640-41. On March 13, 2017, Chapter 2017-1 was enacted and amended § 921.141 to require that the necessary findings had to be made by a unanimous jury.

> where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see § 921.141(5)(f), because seven jurors believe that at least one aggravator applies. The order in this case, however, requires a majority vote for at least one particular aggravator. This requirement imposes on the capital sentencing process an extra statutory requirement. Unless and until a majority of this Court concludes that *Ring* applies in Florida, and that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.

*State v. Steele*, 921 So. 2d 538, 545-46 (Fla. 2005). *See also Ault v. State*, 53 So. 3d 175, 206 (Fla. 2010) ("Under Florida law, in order to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute."). No other elements were recognized.[3]

When *Hurst v. State* issued, Justice Canady wrote a dissenting opinion which was joined by Justice Polston. *Hurst v. State*, 202 So. 3d at 70. In his opinion, Justice Canady objected to how the majority opinion had turned facts referenced in the statute into elements:

> Contrary to the majority's view, "each fact necessary to impose a sentence of death" that must be found by a jury is not equivalent to each determination necessary to impose a death sentence. The case law makes clear beyond any doubt that when the Court refers to "facts" in this context it denotes "elements" or their functional equivalent. And the case law also makes clear beyond any doubt that in the process for imposing a sentence of death, **once the jury has found the element of an aggravator, no additional "facts" need be proved by the government to the jury. After an aggravator has been found, all the determinations necessary for the imposition of a death sentence fall outside the category of such "facts."**

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[3]At Petitioner's trial, the jury was not instructed that it had to find "sufficient aggravating circumstances do exist" beyond a reasonable doubt (R. 506). The jury was instructed if it concluded that sufficient aggravating circumstances existed, "it will be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (R. 506). The jury was not instructed that it had to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

*Hurst v. State*, 202 So. 3d at 77 (emphasis added). Later in his dissent, Justice Canady repeated that he took issue with the majority's elevation of "facts" referenced in the statute into elements:

> whether the aggravation is sufficient to justify a death sentence; whether mitigating circumstances (which are established by the defendant) outweigh the aggravation; whether a death sentence is the appropriate penalty—**are not elements to be proven by the State**. Rather, they are determinations that require subjective judgment.

*Id.* at 82 (emphasis added). From Justice Canady's dissent, it is clear that he objected to the majority's elevation of all of the statutorily identified facts to the status of elements of capital murder when they had not had not previously been so treated.[4] Justice Canady viewed the change made in Florida's substantive law in *Hurst v. State* as a major error.

Justice Canady and Justice Polston have continued in subsequent decisions to express their disagreement with the ruling in *Hurst v. State* and its holding that the jury was required to find elements beyond the existence of one aggravating circumstance. *See e.g. Mosley v. State*, 209 So. 3d 1248, 1285 (Fla. 2016) (Canady, J., concurring in part and dissenting in part, joined by Polston, J.); *Sexton v. State*, 221 So. 3d 547, 561-62 (Fla. 2017) (Canady, J., concurring in part and dissenting in part, joined by Polston, J.); *Bevel v. State*, 221 So. 3d 1168, 1185-86 (Fla. 2017) (Canady, J., concurring in part and dissenting in part, joined by Polston, J.); *Jeffries v. State*, 222 So. 3d 538, 553 (Fla. 2017) (Canady, J., dissenting, joined by Polston, J.); *Williams v. State*, 226 So. 3d 758, 773-74 (Fla. 2017) (Canady, J., dissenting, joined by Polston, J.).

### *E. Respondent's Claim That The Florida Supreme Court Did Not Mean "Elements"*

Notwithstanding what is stated by the majority in *Hurst v. State* and Justice Canady's

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[4]Justice Canady and Justice Polston also dissented from the holding in *Perry v. State* that Chapter 2016-13 unconstitutional. *Perry* issued on the same day *Hurst v. State* issued. In his *Perry dissent,* Justice Canady cited to his reasoning in his *Hurst v. State* dissent.

dissent, Respondent asserts that "[t]hese additional requirements imposed by *Hurst v. State* are not 'elements' of a capital offense, **contrary to Petitioner's argument**." BIO at 15 (emphasis added). This dubious contention is the heart of Respondent's brief. It has to make this assertion to maintain that the statutory construction in *Hurst v. State* did not change Florida's substantive criminal law. Instead, Respondent says that *Hurst v. State* just "greatly expanded" the procedural rule of *Hurst v. Florida*, but this great expansion did not concern substantive law. BIO at 10. The claim that "[t]hese additional requirements imposed by *Hurst v. State* are not 'elements' of a capital offense" (BIO at 15) rings hollow give that was the precise point of contention between the majority in *Hurst v. State* and the dissenters. Indeed, it was because they were elements that *Hurst v. State* held that jury unanimity was held to be required. *Hurst v. State*, 202 So. 3d 53-54 ("We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— are also elements that must be found unanimously by the jury.").

By contending that the Florida Supreme Court did not mean "elements" when it used that word in *Hurst v. State*, Respondent argues that Petitioner has not to raised a federal constitutional issue or cited a federal case that conflicts with the Florida Supreme Court's denial of Petitioner's appeal. In *Richardson v. United States*, 526 U.S. 813, 817 (1999),[5] this Court observed:

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[5]In *Richardson v. United States*, this Court explained: "In this case, we must decide whether the statute's phrase 'series of violations' refers to one element, namely a 'series,' in respect to which the 'violations' constitute the underlying brute facts or means, or whether those words create several elements, namely the several 'violations,' in respect to each of which the jury must agree unanimously and separately." *Richardson*, 526 U.S. at 817-18. *Richardson's* construction of the statute was subsequently found by the circuit courts to be a change in substantive law that (continued...)

> Calling a particular kind of fact an "element" carries certain legal consequences. *Almendarez–Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. *Johnson v. Louisiana*, 406 U.S. 356, 369–371, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748, 68 S.Ct. 880, 92 L.Ed. 1055 (1948); Fed. Rule Crim. Proc. 31(a).

When a statute uses elements to distinguish between a lower and higher degree of an offense, due process requires the elements necessary for higher degree of the offense to be proven by the State beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) ("The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty.").

The substantive law set forth in *Hurst v. State* is being applied to criminal prosecutions in which a murder charge arises from a homicide committed in 1981 to determine if the defendant committed capital murder and can be given a death sentence. *Card v. Jones*. Yet, the Florida Supreme Court refuses to recognize that if *Hurst v. State* was the substantive criminal law in 1981, it must have been the substantive criminal law in 1992 and applicable to Mr. Jimenez.

The Due Process implications of *Hurst v. State* and its holding for the first time that statutorily identified fact were elements of capital murder warrant certiorari review by this Court.

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[5](...continued)
applied retrospectively. "By deciding that the jury had to agree unanimously on each of the offenses comprising the 'continuing series' in a CCE count, *Richardson* interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense. In other words, it altered the meaning of the substantive criminal law. *Bousley*, 523 U.S. at 620, 118 S.Ct. 1604." *Santana-Madera v. United States,* 260 F.3d 133, 138 (2nd Cir. 2001). *See Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002).

## 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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COUNSEL FOR PETITIONER

## 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 November 22, 2018.

/s/. Martin McClain
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