No. _____

OCTOBER TERM 2018

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR TONY JONES,

Petitioner

v.

STATE OF FLORIDA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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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).

In *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017), the Florida Supreme Court on the basis of *Hurst v. State* vacated a death sentence and ordered 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. The homicide at issue in *Card v. Jones* was committed in 1981. *See Card v. State*, 453 So. 2d 17, 18 (Fla. 1984).

In *Victorino v. State*, 241 So. 3d 48 (Fla. 2018), the Florida Supreme Court rejected an ex post facto challenge to holding a new proceeding at which the jury would be required to find the elements of capital murder beyond a reasonable doubt:

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

QUESTIONS PRESENTED

1. Given that the elements of capital murder identified by the Florida Supreme Court in *Hurst v. State* are being applied in a prosecution for a 1981 homicide, can Petitioner's death sentences remain intact given that his jury did not unanimously find the State had proven the elements of capital murder beyond a reasonable doubt in his prosecution for two 1990 homicides?

2. Does Florida's substantive criminal law identifying the elements of capital murder as set forth in *Hurst v. State* govern in the criminal prosecution of Petitioner for two 1990 homicides and invalidate his death sentences?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

PARTIES TO THE PROCEEDINGS BELOW

All relevant parties appear on the cover page of this Petition.

PETITION FOR WRIT OF CERTIORARI

Petitioner, VICTOR TONY JONES, respectfully petitions for a writ of certiorari to review the errors of the Florida Supreme Court.

OPINION BELOW

The Florida Supreme Court's opinion denying relief is published and reported as *Jones v. State,* 241 So. 3d 65 (Fla. 2018) (Appendix A). Show Cause order issued on March 2, 2018 (Appendix B). Response of March 22, 2018 (Appendix C). Reply to Response of April 2, 2018 (Appendix D). Reply to Reply April 16, 2018 (Appendix E).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257.

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

The Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida entered the judgments of conviction and sentence under consideration.

Mr. Jones was indicted by a grand jury in Dade County, Florida and charged with two counts of first-degree murder and two counts of armed robbery. After a jury trial ,the jury found Mr. Jones guilty on all counts. The jury then recommended death sentences by a vote of twelve to zero in Mr. Nestor's death and by a vote of ten to two in Mrs. Nestor's death on the charges of first-degree murder. On March 1, 1993, the Circuit Court of the Eleventh Judicial Circuit imposed judgments of conviction and sentences of death on Jones. On direct appeal to the Florida Supreme Court, Mr. Jones's convictions and sentences were affirmed. *Jones v. State*, 652 So. 2d 346 (Fla. 1995), *cert. denied*, 516 U.S. 875 (1995).

On October 13, 2017, Mr. Jones filed the Fla. R. Crim. P. 3.851 motion that is the subject of this petition. Claim I (which was mistakenly not numbered in the 3.851 motion) asserted that the Eighth and Fourteenth Amendments require retroactive application of the Florida Legislature's Chapter 2017-1 revision of Fla. Stat. § 921.141. Claim II was based on the Eighth Amendment, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The state circuit court held the motion in abeyance until January 9, 2018, when it summarily denied the motion based on the Florida Supreme Court's prior opinion in *Jones v. State*, 231 So. 3d 374 (Fla. 2017), rehearing denied Dec. 27, 2017.

In that opinion, the Florida Supreme Court affirmed the denial of relief based solely on *Hurst v. Florida*, because *Hurst v. State* was not before the Court in that

appeal. A petition for certiorari is pending before this Court on both the intellectual disability claim and the *Hurst v. Florid*a claim denied in that opinion. The petition was docketed on May 31, 2018 in this Court and distributed for the conference of September 24, 2018. *See Jones v. Florida*, Case No. 17-9153.

On February 21, 2018, Mr. Jones filed a notice of appeal of the state circuit court's denial of his October 13, 2017 Rule 3.851 motion, and on April 2, 2018, the Florida Supreme Court issued an order directing Mr. Jones to show cause why the trial court's order should not be affirmed in light of *Hitchcock v. State*, SC17-445. Following a response to the show cause order by petitioner, a reply by the respondent and a response to the reply, the Florida Supreme Court issued an order denying relief. Jones v. State, 241 So. 3d 65 (Fla. 2018). An application for a 60 day extension of time to file certiorari was allowed by Justice Thomas on July 25, 2018. This petition is timely filed.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO ADDRESS THE FLORIDA SUPREME COURT'S READING OF THE FLORIDA CAPITAL SENTENCING STATUTE AS IDENTIFYING ELEMENTS OF CAPITAL MURDER.

In *Hurst v. State* the Florida Supreme Court held that death sentences imposed after a jury did not return **unanimous findings on all facts necessary** to impose a sentence of death were unreliable. Death sentences like the two imposed on Mr. Jones before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. The unreliability of the proceedings giving rise to

Jones's death sentences compounds the unreliability of his death recommendation. The ten to two and twelve to zero recommendations that were returned by his jury, which was unaware of its sentencing responsibility, as recognized in *Hurst v. State*, to such an extent that the interests of fairness outweigh the State's interest in finality in his case.

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). After *Hurst v. State* and the revisions made to Fla. Stat. § 921.141, without additional unanimous jury findings, a death sentence is not even a sentencing option for first-degree murder in Florida. The statute as revised by Chapter 2017-1 now requires for a finding of capital first degree murder that the jury must: 1) identify each aggravating factor that it unanimously finds to exist, 2) unanimously find that sufficient aggravating factors exist to justify a death sentence, 3) unanimously find that the aggravating factors outweigh the mitigating circumstances found to exist, and 4) unanimously find there is no basis for the imposition of a life sentence. *See* § 921.141(2)(b).

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 *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.

Under *In re Winship*, 397 U.S. 358 (1970), each element of a criminal offense must be found proven beyond a reasonable doubt.

The Florida Supreme Court has made it clear that these elements of capital murder are longstanding when it rejected an ex post facto challenge to holding them applicable in a homicide that occurred 12 years before *Hurst v. State* issued and 13 years before Chapter 2017-1 was enacted. In *Victorino v. State*, 241 So. 3d at 50, the Florida Supreme Court explained:

> 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.

The homicides at issue in *Victorino v. State* occurred in 2004. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009). As a result of the recently enacted Chapter 2017-1, its substantive benefit of requiring unanimity is without regard to the date of the crime or to the date the conviction became final. However, because of decisions by the Florida Supreme Court, Chapter 2017-1's benefit currently embraces only those whose sentence was final on or after June 24, 2002. The goal in drawing this cut-off is to delineate cases that are deemed too old to deserve relief. But the rule establishing this cut-off, which thereby created this disparity between individuals that receive Chapter 2017-1's benefit and those that do not, does not reasonably further the purpose of having the rule in the first place. This is because the goal of ensuring only relatively new cases receive Chapter 2017-1's benefit is not accomplished by setting a cut-off date that attaches to the sentence's finality date. Some of Florida's oldest capital cases will receive the benefit of Chapter 2017-1.

For instance, James Card was convicted of a June 3, 1981 homicide and a death sentence was imposed. His conviction and death sentence became final on November 5, 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984), *cert. denied*, 105 S. Ct. 396 (1984).

Card's original death sentence was vacated in collateral proceedings because the judge had the State write his sentencing findings on an ex parte basis. When this was discovered nearly ten years later, a resentencing was ordered. The resentencing was held in 1999. The jury returned an 11-1 death recommendation. Another death sentence was imposed and affirmed on appeal. *Card v. State*, 803 So. 2d 613 (Fla. 2001), *cert denied* 536 U.S. 963 (2002). Because his petition for certiorari review was denied on June 28, 2002 (four days after Florida's June 24, 2002 cut-off date), his death sentence was vacated. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Unless the resentencing jury unanimously returns a death recommendation, Card will receive a life sentence on his conviction final in 1984 of a homicide committed in 1981.

Mr. Jones has been denied the statute's benefit. The murders for which Mr. Jones was convicted and sentenced to death took place on December 19, 1990, years after both the June 3, 1981 murder for which Card was convicted and Parker's 1982 crime. There are many other examples of murder cases receiving relief for murders that are contemporaneous or far older than Mr. Jones's case.[1] Mr. Jones was originally sentenced to death on March 1, 1993. His two death sentences of death remain intact simply because they became final in 1995. *Jones v. State*, 52 So. 2d 346 (Fla. 1995), *cert. denied, Jones v. Florida*, 116 S. Ct. 202 (1995).

The only distinction between Mr. Jones's case and those of cases like Card's is that, as a matter of good fortune and timing, Card received resentencings for murder

[1] *See*: *State v. Dougan*, 202 So.3d 363 (Fla. 2016) (1974 murder); *Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000) (1974 murders); *Johnson v. State,* 44 So. 3d 51 (Fla. 2010) (January 8-9, 1981 murders).

committed years before the ones Mr. Jones was convicted of. That distinction rests entirely on arbitrary factors like luck and happenstance. These are factors unconnected to the crime or the defendant's character.

Because of the widespread problem arising in Florida capital cases in light of the statutory construction set forth in *Hurst v. State*, this Court should issue the writ. As it stands now, Jones 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.

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 a 1981 homicide in *Card v. Jones* to also be applied to Jones's criminal prosecution for a 1989 homicide.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

Respectfully Submitted,

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