DOCKET NO. 18-6956

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

JASON DIRK WALTON,

***Petitioner*,**

vs.

STATE OF FLORIDA, and MARK S. INCH,
Secretary, Florida Department of Corrections

***Respondents*.**

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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Petitioner, **JASON DIRK WALTON,** files his reply to the Respondents' 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 RESPONDENTS' ASSERTED REASONS FOR DENYING THE WRIT

There are several aspects of the Brief in Opposition (BIO) that warrant this reply. First, Respondents either misunderstood or chose to misrepresent the constitutional underpinnings of

[1] On January 3, 2019, the Governor-elect Ron Desantis announced that he was appointing Mark S. Inch as the Secretary of the Florida Department of Corrections.

the questions presented in the Petition. Second, the BIO's contention that the Petition should be denied is entirely dependent upon the erroneous view that the statutory changes enacted after *Hurst v. Florida* issued and the Florida's Supreme Court's ensuing construction of those statutory changes were simply procedural in nature. Third, the BIO contains factual errors that need to be corrected.

A. Respondent Misunderstands or Misrepresents the Constitutional Underpinnings of the Questions On Which Petitioner Seeks Certiorari Review.

To be clear, the questions presented in the Petition concern neither the Sixth Amendment right set forth in *Hurst v. Florida*, 136 S. Ct. 616 (2016), nor the Florida Supreme Court's decision limiting the benefit of this Court's ruling in *Hurst v. Florida* to those capital defendants whose death sentences became final after June 24 2002— the date that the Sixth Amendment ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), issued. Petitioner is not seeking certiorari review on a Sixth Amendment issue.

The BIO acknowledges that on remand the Florida Supreme Court in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), "made **substantial procedural changes**, but concluded that state retroactivity jurisprudence required that the changes apply only to those capital defendants whose cases were not final when *Ring v. Arizona*, 536 U.S. 584 (2002), was rendered." (BIO at i) (emphasis added).[2] Respondents' characterization of the changes made in Florida law as

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[2] This statement is not completely accurate. For instance, Paul Johnson's convictions and death sentences were final when *Ring* issued because his convictions and death sentences for three 1981 homicides were first final in 1983 when affirmed by the Florida Supreme Court. *Johnson v. State*, 438 So. 2d 774 (Fla. 1983). Later in collateral proceedings, a new trial was ordered, and Johnson was again convicted and sentenced to death. On his second direct appeal, the Florida Supreme Court again affirmed. *Johnson v. State*, 608 So. 2d 4, 8 (Fla. 1992). Johnson's convictions and death sentences became final on May 17, 1993, when this Court (continued...)

"procedural" is contrary to this Court's jurisprudence. Respondents clearly want their erroneous use of the "procedural" label to convince this Court that the Petition is not worthy of certiorari review.

The issues raised in the Petition arise not from *Hurst v. Florida*, but rather from the legislative changes in Florida substantive law enacted in the wake of *Hurst v. Florida*—Chapter 2016-13, Laws of Florida, enacted on March 7, 2016, and Chapter 2017-1, Laws of Florida, enacted on March 13, 2017—and the Florida Supreme Court's statutory construction identifying previously unknown elements of capital murder, a criminal offense—*Perry v. State*, 210 So. 3d 630 (Fla. 2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which both issued on October 14, 2016.[3] As a result of *Hurst v. State*, *Perry v. State*, and the revisions to Florida's capital sentencing statute made by Chapter 2016-13 and Chapter 2017-1, the facts or elements needed to found to authorize a death sentence were changed and/or modified.

The significant difference between a constitutional ruling changing who decides whether

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[2](...continued)
denied certiorari review. *Johnson v. Florida*, 508 U.S. 919 (1993). His death sentences remained final until January 14, 2010, when the Florida Supreme Court granted collateral relief on a successive motion for postconviction relief. *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). After he was sentenced to death for the third time, the Florida Supreme Court ruled that he was entitled to the benefit of *Hurst v. State* because his jury's death recommendation was not unanimous. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). Consequently, although Johnson's original death sentences were final when *Ring* issued, he received the benefit of *Hurst v. State* because—for unrelated reasons—his death sentences had been vacated in collateral proceedings, causing his third penalty phase to occur after *Ring* issued.

[3] *Hurst v. Florida* issued on January 12, 2016. Chapter 2016-13 was enacted on March 7, 2016, and it revised § 921.141, Fla. Stat. On October 14, 2016, the Florida Supreme Court issued *Hurst v. State* and *Perry v. State*. Because *Perry v. State* held that Chapter 2016-13 was unconstitutional, Chapter 2017-1 was enacted on March 13, 2017, to fix the constitutional defect identified in *Perry v. State*.

a fact necessary for a death sentence to be authorized and a judicial ruling that changes the facts or elements that must be found to authorize a death sentence was discussed by this Court in *Schriro v. Summerlin*, 542 U.S. 348 (2004). In that case, this Court indicated that the former was a procedural holding, while the latter would be substantive:

> 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. But that is not what *Ring* did; the range of conduct punished by death in Arizona was the same before *Ring* as after. *Ring* held that, because Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators effectively were elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements. 536 U.S. at 609, 122 S. Ct. 2428. This Court's holding that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

Id. at 354.

As this Court explained in *Schriro v. Summerlin*, new substantive rules generally apply retroactively while new procedural rules generally do not:

> 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)).
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not

> make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.

Id. at 351-52 (footnote omitted).

As noted in *Schriro*, much turns on whether a change in the law is a modification in procedural rules or a modification in substantive law. While *Hurst v. Florida* was undoubtedly a change in constitutional law, it is not the change or modification in Florida law giving rise to Petitioner's claims at issue in his Petition.

In *Hurst v. State*, the Florida Supreme Court looked to Florida's capital sentencing statute and held that the facts identified therein that 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 ("[B]efore 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 also had tobe found to exist by a unanimous jury. *Id*. at 54 ("[I]n addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge."). **The Florida Supreme Court acknowledged it had not previously recognized these facts as elements**. *See Asay v. State*, 210 So. 3d 1, 15-16 (Fla. 2016) (noting that the court 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"). Thus, in Florida, the elements of capital murder changed.

In *Perry v. State*, the issue was whether the enactment of Chapter 2016-13, Laws of Florida, on March 7, 2016, applied in pending murder cases in which the homicide at issue occurred before Chapter 2016-13 was enacted. In addressing Chapter 2016-13, the Florida Supreme Court found that under the changes Chapter 2016-13 made to Fla. Stat. § 921.141, the findings that a jury would be required to make before a death sentence would be authorized include "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. Because Florida law had long required that the jury be unanimous in finding the elements of a criminal offense 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 determination 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.[4]

[4] 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.

The Florida Supreme Court had previously regarded the existence of one aggravating factor as all that was necessary to authorize the imposition of a death sentence. 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 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.

State v. Steele, 921 So. 2d 538, 545-46 (Fla. 2005); *see also Ault v. State*, 53 So. 3d 175, 205 (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.

When *Hurst v. State* issued, Justice Canady wrote a dissenting opinion that was joined by Justice Polston. *Hurst v. State*, 202 So. 3d at 70 (Canady, J., dissenting). 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."**

Id. 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:

> [W]hether 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 had not previously been so treated. Justice Canady viewed the change made in Florida's substantive law in *Hurst v. State* as a major error.

Respondents ignore the fact that prior to the issuance of *Hurst v. State*, the only fact in addition to a conviction of first-degree murder that the Florida Supreme Court had said was necessary to authorize a death sentence was the existence of an aggravating circumstance. In *Hurst v. State*, the majority concluded that additional facts or elements were necessaryto increase the sentencing range to include death as a permissible punishment. As *Schriro v. Summerlin* made clear, such a change is a substantive one.

Respondents do not address the specific language in *Hurst v. State* and in *Perry v. State* referencing the additional facts as elements. Instead, Respondents cite to the Florida Supreme Court's recent decision in *Foster v. State*, 258 So. 3d 1248, 1251-52 (Fla. 2018). There, the Florida Supreme Court cites to the relevant Florida statutes and states: "These statutes and the rule of procedure illustrate that the *Hurst* penalty phase findings are not elements of the capital

felony of first-degree murder."[5] However, the legislative labeling cannot be used to deprive defendants of their constitutional rights. What matters for purposes of constitutional law is what is the function behind the label. As Justice Scalia noted in his concurring opinion in *Ring v. Arizona*, the legislature's labels cannot control and be allowed to circumvent constitutional requirements—what matters is functionality and whether the functioning criminal process meets constitutional requirements. 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—*whether the statute calls them elements of the offense, sentencing factors, or Mary Jane*—must be found by the jury beyond a reasonable doubt.") (emphasis added). Accordingly, Respondents' reliance on *Foster v. State* is misplaced. It does not matter how the legislature labeled the findings that a unanimous jury must make. What matters is that a judge cannot impose a death sentence upon a defendant convicted of first-degree murder unless and until the jury unanimously finds those additional facts set forth in *Hurst v. State* that were held to be elements for constitutional purposes.

B. *Respondents' Argument That Certiorari Review Should Not Be Granted Rests Entirely On Its Contention That The Change In Law At Issue Is Procedural.*

Respondents do acknowledge that "after this Court issued *Hurst v. Florida*, the Florida Supreme Court and the state legislature made significant changes to Florida's sentencing procedures in capital cases." (BIO at 4). However, Respondents simply refuse to discuss the

[5] This language in *Foster v. State* is virtually the same language the Florida Supreme Court used in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), when it held that neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000), nor the Sixth Amendment required the jury to make the factual findings necessary to authorize a death sentence. *Mills v. Moore*, 786 So. 2d at 538 ("Therefore, a 'capital felony' is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death."). This Court's decision in *Hurst v. Florida* proved that the reasoning of *Mills v. Moore* was wrong.

additional facts that in *Hurst v. State* were found necessary to authorize death as a sentencing option. *Hurst v. State*, 202 So.3d at 53-54 ("[A]ll 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.").

Respondents ignore the specific language in *Hurst v. State* and Petitioner's assertion that Florida's substantive law was modified to require additional facts not previously required to be found beyond a reasonable doubt. Citing only to *Foster v. State*, Respondents call all the changes procedural and then rely on *Schriro v. Summerlin*:

> *Hurst v. Florida* was based on this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new **procedural rule** that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004).

(BIO at 12) (emphasis in original). However, Petitioner is not asking for certiorari review on a *Hurst v. Florida*, *Ring v. Arizona*, or *Appendi v. New Jersey* claim.

Respondents simply have nothing to say as to what should happen if this change or modification in Florida law was substantive in nature. That is the reason why the writ should issue so that this Court can address whether the modification in Florida law was a change in substantive law, and if so, whether the change should be applied retrospectively to Petitioner's criminal prosecution and require his death sentences to be vacated.

Respondents seem to suggest that there can be no federal constitutional right implicated when modifications are suddenly and judicially made in state law (BIO at 13) ("Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as *Hurst v. Florida* did not address the process of

weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment."). Respondents overlook the fact that the Due Process Clause, on which Petitioner relies, comes into play when a state changes or modifies its substantive law. In *Richardson v. United States*, 526 U.S. 813, 817 (1999),[6] this Court observed:

> 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).

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. When a statute uses elements to distinguish between degrees of an offense, due process requires that the elements necessary for the higher degree of the offense 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

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[6] 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." 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 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 (2d Cir. 2001). *See Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002).

that might lead to a significant impairment of personal liberty.").

C. *Factual Errors In Respondents' BIO.*

In Respondents' discussion of the facts of the case, they omit any reference to the fact that the two co-defendants who were triggerman and committed the murders have received life sentences. Respondents also omit an acknowledgment that the State in seeking death sentences against the co-defendants had maintained that the co-defendants were more morally culpable than Petitioner.

In the BIO, Respondents seem unaware that the Florida Supreme Court addressed two separate collateral proceedings in the opinion that is the subject of the Petition. *See Walton v. State*, 246 So. 3d 246 (Fla. 2018). Before the court was Petitioner's appeal from the denial of a Rule 3.851 motion and a separate original proceeding initiated by a petition for a writ of habeas corpus filed directly in the Florida Supreme Court in June of 2017.

In May of 2015, Petitioner had filed a Rule 3.851 motion on the basis of newly discovered evidence—his co-defendant's life sentence. An evidentiary hearing was conducted on the motion, and the circuit court concluded that the motion was timely and the co-defendant's life sentence qualified as newly discovered evidence. Thus, the issue then became whether Petitioner could satisfy the second prong of the Florida standard set forth in *Jones v. State*, 591 So. 2d 911 (1991): if a resentencing were ordered, would he probably receive a less severe sentence?

Respondents falsely assert that "the postconviction court found that Walton's successive postconviction motion, filed long after the one-year deadline, failed to meet either exception." (BIO at 17). The Florida Supreme Court found the motion timely and properly based on newly discovered evidence. Thus, this left the second prong for consideration—whether it was probable

that at a resentencing Petitioner would receive a sentence of less than death. Resolution of this issue turned on whether the law that would govern at the resentencing should be part of the analysis, i.e., was it probable that the jury would not return a unanimous death recommendation.

Respondents also falsely claim that Petitioner "asserted the novel argument that enactment of a revised capital sentencing statute was a newly discovered fact." (BIO at 17). This is simply not true.

To confuse the matter further, Respondents attach the habeas petition that Petitioner filed in the Florida Supreme Court in June of 2017 as "Appendix A" but refer to the habeas petition as Petitioner's "brief to the Florida Supreme Court." (BIO at 18). An initial and a reply brief were filed in the appeal from the denial of the Rule 3.851 motion.

In the habeas proceeding after the habeas petition was filed, the Florida Supreme Court issued a show cause order. The response to the show cause order and the reply to the State's response provided more detailed and specific analysis of Petitioner's arguments to the Florida Supreme Court. However, Respondents do not even mention those pleadings. For this Court's convenience, they are attached to this Reply as Appendices A and B.

Respondents also assert that Petitioner has failed to acknowledge that his claims were previously addressed and rejected by the Florida Supreme Court. This premise of this statement is false. The Florida Supreme Court has rejected appeals in which the Due Process Clause claim and the Eighth Amendment claim were presented; but when doing so, the court relied upon its retroactivity analysis of the Sixth Amendment claim based on *Hurst v. Florida* that was addressed in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The Florida Supreme Court refused in other cases—just as it refused in Petitioner's case—to actually address the specific claims presented.

CONCLUSION

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

Respectfully submitted,

/s/. Martin J. McClain
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Florida Bar No. 0754773

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 February 11, 2019.

/s/. Martin McClain
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