DOCKET NO. 18-8090

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

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EDWARD J. ZAKRZEWSKI,

***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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Petitioner, **EDWARD J. ZAKRZEWSKI**, 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

The Brief in Opposition (BIO) makes a passing argument that this Court "should not grant review of an issue that is procedurally barred by the law-of-the-case doctrine." (BIO at 8). However, the Florida Supreme Court did not invoke the law-

of-the-case doctrine when it denied Petitioner's collateral appeal. What it did say was:

> [W]e conclude that our prior denial of Zakrzewski's petition for a writ of habeas corpus raising similar claims is a procedural bar to the claims at issue in this appeal. All of Zakrzewski's claims depend upon the retroactive application of *Hurst*, to which we have held he is not entitled.

Zakrzewski v. State, 254 So.3d 324 (Fla. 2018).

By calling the Zakrzewski's claim similar to claims presented in a petition for writ of habeas corpus, the Florida Supreme Court recognized that the claim raised in Zakrzewski's appeal was not a claim that had been raised in the habeas proceeding. Indeed in the habeas petition, Zakrzewski did not raise the Due Process Clause claim and did not rely on *Fiore v. White*, 531 U.S. 225 (2001).

The Florida Supreme Court statement shows that it considered Zakrzewski's claim and concluded that the claim "depend[ed] upon the retroactive application of *Hurst*". It was on the basis of that conclusion that the Florida Supreme Court said that it had previously determined that he was not entitled to the retroactive application and applied a procedural bar based on res judicata principles.

The finding of a procedural bar was not based upon a procedural default. The procedural bar that was applied was

dependent upon whether *Fiore v. White* applied to the statutory construction announced in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), and found to be the law that governed in the 1981 murder case at issue in *Card v. Jones*, 219 So.3d 17 (Fla. 2017).

Clearly the procedural bar that the Florida Supreme Court found was not independent of the federal question at issue in Zakrzewski's petition for a writ of certiorari. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.").

In the BIO, Respondent ignores the difference between substantive criminal law and a procedural rule of constitutional law. It is the substantive law which identifies those facts or elements that constitute a criminal offense and which must be proven existed at the time the alleged crime was committed. A procedural rule of constitutional law concerns the procedure to be used when determining a defendant's guilt of a particular crime.

Substantive criminal law concerns a defendant's conduct. It is the basis for determining whether on a particular day at a

particular time the defendant's conduct constituted a criminal offense. Procedural rules, on the other hand, concern the process by which a defendant's guilt is determined. Thus, what matters is what the procedural rules required when the process was at end, or final. Rules for determining the retroactivity of a new rule procedural rule simply are inapplicable the realm of substantive law which is all about what was the law at the time of the criminal offense.

Normally, substantive law is a legislative function and procedural rules are a judicial function. Legislation almost always comes with an effective date. The exception happens when it courts are called on to construe a criminal statute and have to identify the elements of a criminal offense. When courts must clarify what was viewed as an ambiguous or unclear statute, the judicial construction of the criminal statute constitutes substantive law.

In the BIO Respondent, just like the Florida Supreme Court did in denying Zakrzewski's appeal, refuses to acknowledge that the issue Zakrzewski presents concerns the statutory construction set forth in *Hurst v. State*. At issue is Florida's substantive criminal, not a procedural rule. Respondent discounts Zakrzewski's reliance on *Fiore v. White* and ignores

Bunkley v. Florida, 538 U.S. 835 (2003), altogether.

In *Hurst v. State*, the Florida Supreme Court 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 facts necessary to authorize a death sentence 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."). **The Florida Supreme Court acknowledged it had not previously recognized 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.").

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."**

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. 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 necessary. *Hurst v. State* increased the number of facts or elements needed to increase the sentencing range to include death as a permissible sentence.

The statutory construction in *Hurst v. State* is now being applied as the governing law to conduct that occurred in 1981 to determine if the defendant committed the highest degree of

murder. *Card v. Jones*. Yet, it is not being applied as the governing substantive criminal law to Zakrzewski's conduct in 1994.

Now with four of the five justices in the majority in *Hurst v. State* no longer on the Florida Supreme Court while the dissenters remain, has ordered briefing in a case to reconsider several of its decision.

The situation in Florida is going to continue to fester until this Court considers whether the Florida Supreme Court's rulings have been in accord with *Fiore v. White* and *Bunkley v. Florida*.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review of the questions presented set out in his petition is warranted.

Respectfully submitted,

/s/. Martin J. McClain
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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 May 7, 2019.

/s/. Martin McClain
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