No. 18-9270

OCTOBER TERM 2019

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL ANTONIO RODRIGUEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF FOR PETITONER

CAPITAL CASE

MARIE-LOUISE SAMUELS PARMER
Special Assistant Capital Collateral Counsel
**Counsel of record*

Capital Collateral Regional Counsel-South
110 SE 6th St, Suite 701
Fort Lauderdale, FL 33301
(954) 713-1284

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's Brief in Opposition ("BIO") fails to respond to the Questions Presented. Instead, Respondent re-characterizes its opponent's arguments as an attempt to re-litigate *Hurst*[1] retroactivity. Respondent either fails to understand the issues presented or seeks to mislead this Court.[2] As previously explained, the Florida Supreme Court did not interpret the applicability of Ch. 2017-1 to offenses committed prior to its enactment until March 8, 2018. Not until the court issued its opinion in *Victorino v. State*, 241 So. 3d 48 (Fla. 2018) did the court address the applicability of CH. 2017-1. In *Victorino*, the Florida Supreme Court confirmed that the elements identified in *Hurst v. State* as stemming from Fla. Stat. § 921.141 were not new elements and thus must have been in place at the time of Mr. Rodriguez's crime. *See also*, Article X, section 9 of the Florida Constitution; *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015).[3] As a result, Petitioner's claim did not become ripe until March 2018.

Respondent alleges that Petitioner had a full and fair opportunity to litigate this claim before the Florida Supreme Court and is thus precluded by collateral

---

[1] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Hurst v. Florida*, 136 S. Ct. 616 (2016).

[2] Respondent clearly misstates the record. *See* BIO at 2. Respondent alleges the "facts established an additional robbery" and that the "jury found him guilty of all counts." However, the State never indicted for robbery and only the judge found this additional offense established at the penalty phase, which she then applied in a manner inconsistent with Florida law to support her finding of an additional aggravator. *See* Petition at 6-9.

[3] At the time of drafting Ch. 2017-1, the Florida Legislature was constrained by the "Savings Clause" in Florida's Constitution. This constitutional provision required prospective application of Florida's substantive criminal statutes. Thus, the date of the offense controlled not only what law defined the offense, but also the statutory provisions that determined punishment. *See* Petition at 18-19.

estoppel. Yet Respondent cites no federal case law nor provides any analysis to support its allegation that Petitioner is "barred by the law of the case doctrine." *See* BIO at 10, 11. Likewise, the Florida Supreme Court failed to clarify how Petitioner's claim was barred given that *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), was in the same procedural posture as Petitioner and the issue was obviously addressed and resolved in *Foster*, not *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Respondent cannot escape review by relying on a mere statement without any legal support.

The entire argument underlying Respondent's BIO focuses on the Florida Supreme Court's partial retroactivity ruling which Respondent contends is immune from federal review. However, as Petitioner has repeatedly explained, retroactivity is simply not at issue here; rather it is the inability of the Florida Supreme Court to fully comply with this Court's Eighth and Fourteenth Amendment jurisprudence. This Court has struck down capital sentencing statutes which failed to create any "'inherent restraint on the arbitrary and capricious infliction of [a] death sentence,' because a person of ordinary sensibility *could find that almost every murder fit the stated criteria*.'" *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (internal citations omitted) (emphasis added). This Court has also determined that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *Id.* Yet, in *Foster v. State*, the Florida Supreme Court ignored the necessary function of aggravating factors. Instead, the court interpreted Ch. 2017-1 in a manner which expands the categories of murder subject to the death penalty under Florida

law. *See Foster v. State*, 258 So. 3d at 1252 ("it is not the *Hurst* findings that establish first-degree murder as a capital crime for which the death penalty may be imposed. Rather, in Florida, first-degree murder, is by its very definition, a capital felony.").

Both Respondent and the Florida Supreme Court fail to recognize that the relevant inquiry is one of effect and not form. *Ring v. Arizona*, 536 U.S. 584 (2002). Although Respondent's policy arguments may be compelling, the legal arguments are not. While the constitution allows a state to maintain a capital sentencing scheme, it must be applied in a manner consistent with federal law. Given the *Furman* line of cases mandate legislatively defining the class of persons whose crimes are among the "worst of the worst," the real question in this case is what constitutes "capital murder"—or more precisely—whether it is constitutionally permissible to allow every "murder" to be automatically eligible for a death sentence under Florida law. As it currently stands, the Florida Supreme Court has disregarded all its prior precedent regarding the substantive nature of aggravating factors as well as its precedent from *Hurst v. State*[4] to conclude that a defendant is convicted of "capital murder" at the guilt phase, once the elements of "first degree murder" have been established under Fla. Stat. § 782.04.

---

[4] Respondent alleges that the elements identified by the Florida Supreme Court in *Hurst v. State* are not in fact elements. BIO at 17-18. However, *Hurst v. State* expressly stated: "thus, *we hold that in addition* to unanimously finding the existence of any aggravating factor, they jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death an unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity *in finding all the elements* of the offense to be proven…" 202 So. 3d at 54 (emphasis added).

> Fla. Stat. § 782.04 provides: "Murder—(1)(a) the unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
>
> > trafficking offense; arson; sexual battery; robbery; burglary; kidnapping; escape; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aircraft piracy; unlawful throwing, placing or discharging of aa destructive device of bomb; carjacking; home-invasion robbery; aggravated stalking; murder of another human being; resisting an officer with violence to his or her person; aggravating fleeing or eluding with seriously bodily injury or death; felony that is an act of terrorism or is in furtherance of an act of terrorism; human trafficking; or
>
> 3. Which result from the unlawful distribution by a person of 18 years of age of older any of the following substances or, mixture containing any of the following substances, when such substance of mixture is proven to be the proximate cause of the death of the user [enumerated controlled substances a.-i.]
>
> *Is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082*.

Thus, under the Florida Supreme Court's interpretation in *Foster v. State*, Fla. Stat. § 921.141 plays no role in defining what constitutes a "capital felony."

In *Sattazahn v. Pennsylvania*, this Court reiterated "that aggravating circumstances that make a defendant eligible for the death penalty 'operate as the functional equivalent of an element of a greater offense.'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (internal citations omitted). Moreover, *Sattazahn v. Pennysylvania* establishes that "murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*." *Id.* at 112. Yet the Florida Supreme Court interprets Fla. Stat. § 921.141 as separate and distinct from Fla. Stat. § 782.04

in order to conclude that Florida law does not have a separate, elevated offense. *See Foster v. State*, 258 So. 3d at 1252 ("Moreover, section 921.121 [involves] '*Separate Proceedings on Issue of Penalty*"). Not only does this rationale fail to comport with this Court's jurisprudence, it also ignores the function the legislature's enumerated statutory aggravators were intended to serve.[5] By refusing to read the two applicable statutes in tandem to narrowly define the class of murders subject to the death penalty, the Florida Supreme Court has effectively determined that any "murder" is automatically eligible for the death penalty, albeit at the discretion of a prosecutor. *See Foster v. State*, 258 So. 3d at 1252 ("Florida Rule of Criminal Procedure 3.112(b) defines a capital trial as 'any first-degree murder case in which the State has not formally waived the death penalty on the record.'").

As previously explained, under Florida's bifurcated system, the State remains an outlier.[6] The aggravation is not charged in the indictment nor is the jury allowed

---

[5] Surely the Florida Legislature did not intend for every felony murder under Fla. Stat. § 782.04 (2) to automatically qualify as a "capital felony," *i.e.*, felony subject to a death sentence, as such an interpretation would clearly violate *Enmund v. Florida*, 458 U.S. 782 (1982). As such, it belies reason to conclude that a defendant has been convicted of a "capital felony" at the guilt phase before the jury has even had an opportunity to consider the statutorily defined aggravators or "eligibility factors."

[6] For example, Ohio legislatively defines the categories of murder subject to a death sentence and a defendant is given notice their offense is subject to the ultimate penalty via an indictment. If the jury finds the aggravation from the indictment established beyond a reasonable doubt at the guilt phase, only then does the jury proceed to a penalty phase under Ohio law. CF., Ohio Stat. § 2903.01 Aggravated Murder; Ohio Stat. § 2903.02 Murder; with Fla. Stat. § 782.04, Murder. *See also, Rauf v. Delaware*, 145 A. 3d 430 (Del. 2016) (explaining Delaware's former bifurcated statute required the jury to answer two questions following the guilt phase and prior to the penalty phase in order to determine death eligibility).

to consider aggravating factors until it reaches the penalty phase, at which point, under *Foster v. State*, a defendant has already been convicted of the "capital felony." *See Foster*, 258 So. 3d at 1251 ("if the jury makes these findings, it does so after a jury has unanimously convicted the defendant of the capital crime"). Accordingly, the purported "eligibility phase" simply does not exist under Florida law. Rather, under the Florida Supreme Court's interpretation, every defendant convicted of any first degree murder, without reference to any statutorily defined aggravation, faces a possible death sentence.

Interestingly, Florida's history prior to *Furman v. Georgia*, establishes state law required "finding[s] by the jury of *all the elements necessary for conviction of murder that subjected the defendant to the ultimate penalty,* unless mercy was expressed in the verdict of the jury as allowed by law." *Hurst v. State*, 202 So. 3d at 56 (emphasis added). Following *Furman*, and the removal of the jury's role as final arbiter, however, Florida expanded the number of statutorily defined aggravators which expose an individual to the death penalty. Now in *Foster v. State*, the Florida Supreme Court has provided an even broader definition which virtually encompasses all first degree murders in the State. Under this sweeping interpretation, which even Respondent would concede is inconsistent with post-*Hurst* precedent,[7] a capital

[7] Currently, the State of Florida is litigating *Owen v. State*, SC-18-810, before the new Florida Supreme Court. There, the new court directed the parties to address whether it should "recede from the retroactivity analysis in *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 so. 3d 1248 (Fla. 2016); and *James v. State*, 615 So. 2d 668 (Fla. 1993)." In response, the State alleged *Asay v. State* should be overturned as its analysis relied on an improper reading of *Ring v. Arizona* and cannot be reconciled with *Foster v. State*, which the State alleges was correctly

murder conviction depends more on a local prosecutor's discretion to charge than it does the legislatively defined elements identified in *Hurst v. State* and confirmed by Ch. 2017-1. *See* Fla. Stat. § 921.121. Thus, in addition to ignoring this Court's Eighth Amendment jurisprudence, the Florida Supreme Court's holding in *Foster v. State* reveals the court continues to treat elements as sentencing factors in direct conflict with this Court's command in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Foster v. State demonstrates an expansion of the death penalty's applicability under Florida law contrary to Eighth Amendment principles. *Furman v. Georgia* condemned statutes which left juries with untrammeled discretion to impose or withhold the death penalty. Likewise, the Florida Supreme Court's interpretation of Ch. 2017-1—which leaves undefined discretion to prosecutors and negates an "eligibility phase"—cannot be said to adequately safeguard against prejudicial or arbitrary factors. By refusing to read Fla. Stats. §§ 782.04 and 921.141 in union, the Florida Supreme Court has left the legislative task of defining what constitutes "capital murder" to local prosecutors, thus injecting a new form of arbitrariness into the state's capital sentencing scheme in violation of the Eighth and Fourteenth Amendments. Like Florida's 2016 capital scheme, it can hardly be said that Florida's "new"[8] capital scheme passes constitutional muster.

---

decided. *See* Owen Answer Brief at 14-15. Most importantly, the State summarized the holding in *Foster v. State* as "reject[ing] characterization of *Ring* findings as elements of the crime of capital first degree murder." *See* Answer at 20.

[8] *Perry v. State*, 210 so. 3d 630 (Fla. 2016), establishes Florida's current capital sentencing scheme contains elements identical to its prior scheme. However, the "new" system now requires unanimity and expressed jury findings as to each element,

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARIE-LOUISE SAMUELS PARMER
Special Assistant CCRC-South
Florida Bar No. 0005584
marie@parmerdeliberato.com
* *Counsel of record*

MARTA JASZCZOLT
Staff Attorney
Florida Bar No. 119537
jaszczoltm@ccsr.state.fl.us
Capital Collateral Regional Counsel- South
110 SE 6th St., Suite 701
Fort Lauderdale, FL 33301
(954) 713-1284
(954) 713-1299 (fax)

Attorneys for Petitioner

including the "sufficiency" and "weighing" elements. Thus, Respondent's reliance on *Kansas v. Carr*, 136 S. Ct. 633 (2016), is unavailing as this Court's review of Kansas state law has no bearing on the Florida Supreme Court's identification of elements in its own statute. Moreover, the issue presented in *Kansas v. Carr* involved jury instructions regarding mitigating circumstances. *Kansas v. Carr* did not address whether a state court's identification of elements in the statutes plain language, and a legislature's confirmation of those elements, is substantive criminal law. Lastly, unlike Florida, Kansas has a "capital murder" statute which is distinct from its "first-degree murder" statute and thus delineates and limits the class of murders eligible for a death sentence in accordance with this Court's jurisprudence. CF. KS. Stat. § 21-5402. Murder in the first degree, KS. Stat. § 21-5401 Capital Murder; and Fla. Stat. § 782.04 Murder.