DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

MANUEL ANTONIO RODRIGUEZ,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

On petition for a writ of certiorari
to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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

Capital Collateral Regional Counsel-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284

QUESTIONS PRESENTED

CAPITAL CASE

1. Whether the Florida Supreme Court's rationale in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), mirrors the overruled rationale of *Hildwin v. Florida*, 490 U.S. 638 (1989) and reveals that Florida continues to treat the elements of capital murder as sentencing factors?

2. Whether the Florida Supreme Court's application of *Foster v. State* here constitutes a denial of Federal Due Process under the Eighth and Fourteenth Amendments to the U.S Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner Manuel Antonio Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

CITATIONS TO OPINIONS BELOW

The Florida Supreme Court's postconviction opinion at issue in this petition is reported as *Rodriguez v. State*, 260 So. 3d 146 (Fla. 2018) Pet. App. A. The postconviction court's order denying relief is unreported and is referenced as *State v. Rodriguez, Order*, Case No. F93-25817B (Fla. 11th Jud. Cir. April 30, 2018). Pet. App. D.

STATEMENT OF JURISDICTION

The Florida Supreme Court affirmed the trial court's denial of Rodriguez's postconviction motion on December 13, 2018. Pet. App. A. On March 1, 2019, Justice Thomas extended the time to file this petition to May 12, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No state shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This Court's landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972) led

to the creation of Florida's capital sentencing scheme which was upheld until *Hurst v. Florida*, 136 S. Ct. 616 (2016). The plurality opinions in *Furman* guided the Florida Supreme Court and Florida Legislature in their hasty efforts to create a new death penalty system which would meet constitutional mandates. In 1973, Florida became the first state to reinstate the death penalty. While other State's responded to *Furman* by changing their capital punishment schemes to allow the trial judge to make the ultimate life-or-death decision or alternatively enacted mandatory statutes which outlined specific crimes for which the death penalty was required, Florida took a different approach. The Florida Legislature responded by narrowing the crimes for which death was a possibility and adopted a specific statute under which a defendant would be eligible for a death sentence only if he was found to have committed, not just a homicide, but a type of homicide that the statute identified as especially egregious and deserving of the harshest penalty.

In *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court reviewed and interpreted the Legislature's new death penalty scheme which revised Fla. Stat. § 782.04 and enacted § 921.141. The combination of these two statutes created a hybrid trial system for capital cases. Under Florida's post-*Furman* approach, the jury no longer had the ability to express their findings regarding death eligibility during a single-stage guilt phase. Instead, the new statute required the jury to make these findings during a "penalty phase." The Florida Supreme Court upheld the statute as compatible with *Furman*'s mandates because it provided "meaningful restraints and guidelines" for the "judge and jury" in capital sentencing. *State v. Dixon*, 283 So. 2d

at 9. According to the Florida Supreme Court, the "most important safeguard" in the statute, "is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." *Id.* at 8. Thus, the Florida Supreme Court concluded, "**[t]he aggravating circumstances of Fla. Stat. s 921.141(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. ss 782.04(1)** and 794.01(1), F.S.A.- to which the death penalty is applicable in the absence of mitigating circumstances. As such, **they must be proved beyond a reasonable doubt before being considered by judge or jury**." *Id.* at 9 (emphasis added).

Following *Hurst v. Florida*, the Florida Supreme Court held, "all 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." *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016). The Florida Supreme Court then identified the elements necessary in order to "essentially convict a defendant of capital murder." *Id.* at 53. According to the Florida Supreme Court, in order to be properly convicted of capital murder, the jury must find: 1) the presence of aggravating factors as statutorily defined, 2) a finding of fact that sufficient aggravating factors exist to justify a death sentence, and 3) a finding that the aggravating factors outweigh any mitigating factors. *Id.*

On March 13, 2017, Chapter 2017-1, Laws of Florida, was enacted. It revised Fla. Stat. § 921.141 by confirming and incorporating *Hurst v. State* and its construction of the statute and the elements necessary for the range of punishment to include death. The Florida Supreme Court reviewed the revised statute in *Foster*

v. State, 258 So. 3d 1248 (Fla. 2018). There, the court interpreted the new statute in the same manner as the court had done in *State v. Dixon* in 1973. Relying on the "five concrete steps between conviction and the imposition of the death penalty,"[1] the court rejected Foster's due process argument as meritless, noting the State of Florida does not have a crime "expressly termed capital first degree murder." *Foster v. State*, 258 So. 3d at 1251. Given that this "greater offense" does not exist under Florida law, the Florida Supreme Court held Foster had been properly convicted of "first degree murder" which is, "by its very definition, a capital felony." *Id.* at 1252.

In holding that "Foster's guilt phase jury considered all of the elements necessary" *see Foster*, 258 at 1252, to convict him of "capital murder," the Florida Supreme Court's rationale is indistinguishable from *Ring v. Arizona* and is in conflict with this Court's reasoning in *Hurst v. Florida*. *See Ring v. Arizona*, 536 U.S. 584, 586 (2002) (Rejecting Arizona's argument that "Arizona's first-degree murder statute authorizes a maximum penalty of death only in a formal sense, *for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty*. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting." (internal citations omitted) (emphasis added); *Hurst*, 136 S. Ct. at 624 ("time and subsequent cases have washed away the logic of *Spaziano* and

[1] Cf. *Foster v. State*, 258 So. 3d at 1251 and *State v. Dixon*, 283 So. 2d at 7 ("After his adjudication, this defendant is nevertheless provided with five steps between conviction and the imposition of the death penalty-each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.")

Hildwin.").

In *Hildwin v. Florida*, 490 U.S. 638 (1989), the Petitioner similarly argued that under the Florida Supreme Court's interpretation of Florida law, the provisions of Fla. Stat. § 921.141 are elements which are part of the substantive offense of capital murder that must be found by a jury beyond a reasonable doubt before a death sentence may be imposed. While the Florida Supreme Court found the argument meritless in 1988, this Court did not. Instead, the Court rejected Hildwin's Due Process and Sixth Amendment arguments because it found "the existence of an aggravating factor here is not an element of the offense but instead is a 'sentencing factor.'" *Hildwin*, 490 U.S. at 640. That reasoning was subsequently rejected by the Court in *Ring v. Arizona*, 536 U.S. at 587 ("If a Legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element.").

The Florida Supreme Court's analysis in *Foster v. State* reveals the court continues to treat the elements of capital murder as sentencing factors while ignoring the due process implications associated with Florida's unique hybrid system. *Bullington v. Missouri*, 451 U.S. 430 (1981) (Because Missouri enacted a bifurcated capital sentencing procedure which functioned like a trial on the issue of guilt or innocence, the Court held that the protections of the Double Jeopardy Clause of the Fifth Amendment applied). Unlike what happened in Arizona following *Ring v. Arizona*, in Florida, the Supreme Court adopted a new construction of a statute that had been in existence since 1973 and the Legislature confirmed that construction.

In treating Rodriguez's appeal as raising a claim based upon a procedural ruling, as opposed to Florida's substantive law, the Florida Supreme Court refuses to grapple with the distinctions between Florida and Arizona law. As this Court recognized in *Schriro v. Summerlin*, "[n]ew substantive rules generally apply retroactively. This includes decision that narrow the scope of a criminal statute by interpreting its terms…" 542 U.S. 348 (2004), (internal citations omitted). This Court should grant certiorari to determine whether the Florida Supreme Court's decision in *Foster v. State* and its application here constitutes a denial of due process under the Eighth and Fourteenth Amendments to the U.S Constitution.

STATEMENT OF THE CASE AND FACTS

In 1996, Manuel Antonio Rodriguez was convicted of three counts of first degree murder and was sentenced to death by the trial court following the jury's unanimous and generalized recommendation of death.

Mr. Rodriguez was indicted along with his codefendant Luis Rodriguez on September 15, 1993, for three counts of first-degree murder and burglary while armed, with the underlying offenses of assault and robbery[2] that occurred on December 4, 1984. Law enforcement officers were unable to solve these crimes until 1992 when Rafael Lopez, Luis Rodriguez's brother-in-law, contacted police hoping to get reward money that had been offered for information on the murders. Based on

[2] Defense counsel filed a Motion to Strike/Dismiss count IV of the indictment which supported the felony murder theory because the statute of limitation had run. The prosecutor agreed, noting, "in fact, counsel would have been right, had we in fact, indicted the crime of robbery." (T.76).

the information from Lopez, police contacted Luis who implicated Mr. Rodriguez. Mr. Rodriguez pled not guilty and has always maintained his innocence. However, his codefendant, Luis, was allowed to plead guilty to a lesser charge of second-degree murder in exchange for his testimony at Mr. Rodriguez's trial. The jury found Mr. Rodriguez guilty of three counts of first degree murder and burglary while armed, with an underlying assault on October 24, 1996 (R/ 867-87).

At the penalty phase, the court instructed the jury on six aggravating factors (T/4308-4311),but included an instruction to avoid impermissible doubling of aggravators.[3] The court then instructed the jury it could consider three mitigating circumstances (T/4312). The verdict form provided to the jury listed two options: "a majority of the jury advise and recommend" a death sentence or "the jury advises and recommends" a sentence of life imprisonment without the possibility of parole for twenty-five years (T/4315-16). The jury deliberated an hour and twenty minutes and returned a 12-0 death recommendation for each murder (T/4323). The forms signed by the jury simply indicated that it recommended and advised, by a 12-0 vote that the court impose the death penalty on Mr. Rodriguez. The forms revealed no "findings" made by the jury regarding any eligibility factors set forth in Florida's statute nor did the jury make any findings about mitigation.

On January 31, 1997, the judge, following the jury's recommendation, made

[3] "If you find that the murder was committed for financial gain and if you find that the murder was committed during the course of a burglary, then you must determine whether both aggravating circumstances are supported by the same aspect of the offense. If both aggravating circumstances are supported by the same aspect, then you must consider the two factors as one factor" (T4309-4310).

the written findings of fact required to impose a death sentence under Florida law and sentenced Mr. Rodriguez to death. (R/1738-1792; T/4454-55). Despite instructing the jury to avoid impermissibly doubling 1) pecuniary gain; and 2) committed in the course of an armed burglary, the judge herself failed to merge the two aggravators as required by Florida law. Instead, the judge found all six aggravators had been proven beyond a reasonable doubt. The judge explained that she did not need to merge the two aggravators because "the State also proved beyond a reasonable doubt that all three homicides were committed while the Defendant was also engaged in the commission of a robbery." *See* Pet. App. E. By basing the existence of pecuniary gain on the "robbery which also took place during the commission of [the] capital felonies," the judge was able to give both aggravating circumstances great weight. *Id.* According to the judge, this additional crime of robbery—which the jury never found in their verdict—was proven beyond a reasonable doubt. The judge also rejected all three statutory mitigating circumstances upon which the jury had been instructed in spite of the wealth of evidence presented on Rodriguez's mental health.

On February 2, 2000, the Florida Supreme Court affirmed Rodriguez's convictions and sentences, even though the court found a number of errors: 1) the comments on Rodriguez's refusal to answer questions was improper but harmless, 2) the Detective's comments about Rodriguez's alias and ID number was improper but harmless, 3) and the prosecutor's introduction of hearsay testimony through the Detective regarding another inmate's claim that Rodriguez faked his mental illness was an improper violation of Rodriguez's Sixth Amendment right to confrontation but

the error was harmless. *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000). The Florida Supreme Court also determined that the trial court had impermissibly doubled aggravators but again found the error harmless, "given the five remaining **valid** aggravating circumstances." *Id.* at 46, (emphasis added). On October 2, 2000, this Court denied certiorari. *Antonio Rodriguez v. Florida*, 531 U.S. 859 (2000).

On April 16, 2004, Rodriguez filed his amended motion to vacate his judgment and sentence under Florida Rule of Criminal Procedure 3.850. The trial court granted a limited evidentiary hearing on 6 sub-issues of claim I relating to errors at the guilt phase. Following the evidentiary hearing, the trial court summarily denied the remaining claims.

Rodriguez appealed the denial to the Florida Supreme Court on May 15, 2005. He also timely filed a petition for writ of habeas corpus raising nine claims with the Florida Supreme Court on July 12, 2007. While the appeal was pending, Rodriguez filed a successive Fla. R. Crim. Pro. 3.851 motion, alleging among other things, that his convictions are materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel, the withholding by the state of material exculpatory and impeachment evidence, and the existence of newly discovered evidence. Following oral argument on his appeal of his initial 3.851 motion, the Florida Supreme Court relinquished jurisdiction for further evidentiary proceedings on his successive motion. *Rodriguez v. State*, No. SC05-859 & SC07-1314 (Fla. April 30, 2008). A second limited evidentiary hearing was held and the trial court entered an order denying relief on October 6, 2008.

The Florida Supreme Court affirmed the denial of Rodriguez's appeal but found that the State violated *Brady* by failing to disclose two letters containing impeachment evidence relating to the co-defendant, Luis. The court "strongly condemn[ed]" the prosecutor's failure to turn over the letters, calling his explanation "disingenuous," but nonetheless found the violation harmless. As to Rodriguez's *Brady*/*Giglio* claims involving his co-defendant, Luis, and his brother, Isidoro, and the impeachment of the State's jailhouse informant, Alejandro Lago, the court found that Rodriguez could not show prejudice. *See Rodriguez v. State*, 39 So. 3d 275 (Fla. 2010).

Rodriguez timely filed a habeas petition in the United States District Court for the Southern District of Florida on July 26, 2010. The district court denied relief. The United States Court of Appeals for the Eleventh Circuit affirmed. *Rodriguez v. Secretary, Fla. Dept. of Corr.*, 756 F. 3d 1277 (11th Cir. 2014). This Court denied certiorari on March 30, 2015. *Rodriguez v. Jones*, 135 S.Ct. 1707 (2015).

On May 22, 2015, Rodriguez filed a successive motion pursuant to Fla. R. Crim. Pro 3.851 and 3.203 alleging that his death sentences were unconstitutional pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014). The postconviction court summarily denied his claim and the Florida Supreme Court affirmed the denial, finding that Rodriguez's application was "time-barred." *Rodriguez v. State,* 250 So. 3d 616 (Fla. 2016), re'hrng denied, October 21, 2016.

On January 10, 2017, Rodriguez filed a successive motion for postconviction relief based on *Hurst v. Florida* and *Hurst v. State*. He argued that his death

sentences must be vacated because a judge, and not the jury, made the necessary factual findings to subject him to a death sentence. Rodriguez asserted that verdicts that lack the necessary factual findings, and that emanate from jurors who have been unconstitutionally instructed that mercy can plan no role in their decision-making and that the responsibility for whether the defendant lives or dies rests with someone else, necessarily carry with them a lack of reliability and impermissible likelihood that the decision to impose death was made arbitrarily in violation of the Eighth Amendment. Rodriguez additionally argued that the *Hurst* decisions should apply retroactively to him under state and federal law, specifically invoking the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Rodriguez also argued that limited retroactivity violates both the state and federal constitutions.

On May 4, 2017, the trial court denied the motion finding that the Florida Supreme Court's bright-line rules in *Asay v. State*, 210 So. 3d 1 (2016) and *Davis v. State,* 207 So. 3d 142, 174 (Fla. 2016), precluded relief. Rodriguez timely appealed to the Florida Supreme Court and his appeal was stayed pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a pre-*Ring* death sentence case. On August 10, 2017, the Florida Supreme Court denied relief in *Hitchcock*. Thereafter, the Florida Supreme Court directed Rodriguez to proceed pursuant to an unorthodox truncated "show cause" procedure and submit briefing as to why the court's order should not be affirmed in light of *Hitchcock v. State.*

On January 31, 2018, without any discussion of Rodriguez's individual claims,

the Florida Supreme Court denied relief, holding that because Rodriguez's death sentences became final in 2000, "Hurst does not apply retroactively to [his] sentences of death. See Hitchcock, 226 So. 3d. at 217." *Rodriguez v. State*, 237 So. 3d 918, 919 (Fla. 2018). Rodriguez filed a Petition for Writ of Certiorari with this Court which was denied on October 1, 2018. *Rodriguez v. Florida*, 139 S. Ct. 209 (2018).

On March 13, 2018, Rodriguez filed a successive motion for postconviction relief based on the enactment of Chapter 2017-1, Laws of Florida. Rodriguez argued that the statutory construction set forth in *Hurst v. State*, and confirmed by the Legislature's enactment of Chapter 2017-1, constitutes Florida substantive criminal law as it identifies the elements of the highest degree of murder which must be proven before a death sentence is authorized. He alleged that the Due Process Clause as explained in *In re Winship*, 397 U.S. 358 (1970), requires the State to prove the elements of capital murder beyond a reasonable doubt:

> *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979).

Relying on *Fiore v. White*, 531 U.S. 225 (2001) and *Alleyne v. United States*, 133 S. Ct. 2151 (2013) Rodriguez alleged that he has not been properly convicted of the substantive offense of capital murder as defined by Florida law. He argued that in *Hurst v. State*, the Florida Supreme Court merely identified the elements which had always appeared in the statute's plain language. Since the Florida Supreme Court identified these facts as elements "necessary to essentially convict a defendant

of capital murder," Rodriguez alleged that his death sentences stand in violation of the Due Process Clause and the Eighth and Fourteenth Amendments to the U.S Constitution.

The Respondent replied that Rodriguez's claim was procedurally barred by both the "law of the case doctrine" and collateral estoppel. Respondent also alleged that regardless of the procedural bar, Rodriguez's claim lacks merit as Chapter 2017-1 is procedural and not retroactive. The Respondent relied on *Ring v. Arizona* and *Schriro v. Summerlin*'s analysis before turning to the Legislature's intent as expressed in the legislative history of Chapter 2017-1 to support its claim that the Legislature did not intend for Chapter 2017-1 to apply to all prior death sentences.

The trial court denied Rodriguez's successive postconviction motion on April 30, 2018. Rodriguez timely appealed to the Florida Supreme Court and was again directed to proceed pursuant to a truncated "show cause" procedure and submit briefing as to why the court's order should not be affirmed in light of *Hitchcock v. State*, despite the fact that *Hitchcock* did not discuss Chapter 2017-1 or the due process argument presented by Rodriguez in any way.

On December 13, 2018, the Florida Supreme Court rejected Rodriguez's appeal:

> "we conclude that our prior denial of Rodriguez's postconviction appeal raising similar claims is a procedural bar to the claim at issue in this appeal, which in any event does not entitle him to *Hurst* relief. *See Foster v. State*, No. SC18-860, 2018 WL 6379348 (Fla. Dec. 6, 2018); *Rodriguez*, 237 So. 3d at 919; *Hitchcock*, 226 So. 3d at 217."

Rodriguez v. State, 260 So. 3d 146 (Fla. 2018), Pet. App. A.

The Florida Supreme Court did not address Rodriguez's due process argument

that was premised upon the statutory construction in *Hurst v. State* and this Court's decisions in *In re Winship* and *Fiore v. White*. It treated Rodriguez's appeal as raising a claim based upon a procedural ruling, as opposed to Florida's substantive criminal law.

Rodriguez subsequently filed a Motion for Clarification and/or Rehearing, *see* Pet. App. B. Rodriguez sought clarification as the opinion applied a procedural bar to his appeal but failed to explain why the appeal was barred as he had not previously raised a "similar claim" and *Foster v. State* issued while Rodriguez's appeal was already pending. The Florida Supreme Court issued a "Show Cause Order" requiring Rodriguez to distinguish his case from *Hitchcock*, yet at the same time allowed Foster full briefing on his due process claim involving Chapter 2017-1. In issuing *Foster v. State* weeks before *Rodriguez*, the Florida Supreme Court clearly determined that the due process claim at issue had not been litigated nor addressed in *Hitchcock*, yet still denied Rodriguez the opportunity to litigate his claim with full briefing. The Florida Supreme Court denied the Motion on December 28, 2018. Pet. App. C.

This petition follows.

REASONS FOR GRANTING THE PETITION

A. THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO CONSIDER WHETHER THE FLORIDA SUPREME COURT'S RATIONALE IN *FOSTER V. STATE* IS INCONSISTENT WITH THIS COURTS PRECEDENT AND WHETHER ITS APPLICATION TO MR. RODRIGUEZ CONSTITUTES A DENIAL OF DUE PROCESS.

In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), the Florida Supreme Court reaffirmed its conclusion in *Hurst v. State* that the statutorily identified facts necessary to increase the range of punishment to include a death sentence were elements of a

higher degree of murder:

> [O]ur retroactivity analysis in *Johnson* hinged upon our understanding of *Ring*'s application to Florida's capital sentencing scheme at that time. **Thus, we did not treat 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**. Specifically, because we were still bound by ***Hildwin***, we did not properly analyze the purpose of the new rule in *Ring*, which was to protect the fundamental right to a jury in determining each element of an offense.

Asay v. State, 210 So. 3d at 15-16 (emphasis added).

Identifying the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (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).

As the Florida Supreme Court noted in *Hurst v. State*, Florida's substantive criminal law identifying the elements necessary to convict a defendant of capital murder are "longstanding and appeared in the statue." *Hurst*, 202 So. 3d at 53. However, the Florida Supreme Court's reading of the statute in *Hurst v. State* was different from how the statute had been previously understood. The Florida Supreme Court had previously regarded the existence of one aggravating factor as all that was necessary to authorize the imposition of death. *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005) ("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."). *See also*, *Hurst v. Florida*, Brief for Respondent at 17 ("Florida law enumerates specific statutory aggravators, and a defendant is eligible for the death penalty if one

or more of those aggravators is found. Thus, the Florida Legislature has determined that a murder featuring an aggravating circumstance is "a greater offense" than a murder with no aggravating circumstance.").

In *Vaught v. State*, 410 So. 2d 147, 149 (Fla. 1982), the Florida Supreme Court held "that the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." Similarly, in *Morgan v. State*, the appellant argued that § 921.141 was unconstitutional as "the statute seeks to regulate matters of criminal trial practice and procedure, which are exclusively the province of [the Florida Supreme Court]." 415 So. 2d 6, 11 (Fla. 1982). The Florida Supreme Court rejected this argument noting:

> **…the aggravating and mitigating circumstances enumerated in section 921.141 are substantive law.** (citations omitted). "The aggravating circumstances of Fla. Stat. § 921.141 (6) F.S.A., [sic] actually define those crimes when read in conjunction with Fla. Stat. §§ 782.04 (1) and 794.01(1), F.S.A. to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury." To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted. (internal citations omitted).

Id. (emphasis added).

In *Hootman v. State*, the Florida Supreme Court again held that aggravating circumstances are a "critical part of the substantive law of capital cases." 709 So.2d 1357, 1360 (Fla. 1998), abrogated on jurisdictional grounds, *State v. Matute-Chirinos*, 713 So.2d 1006 (Fla. 1998). In *Hootman*, the State argued that the addition of a new

aggravator[4] to the statute was "purely procedural" and "neither altered the definition of the crime nor increased the penalty by which the crime is punishable." 709 So. 2d at 1360. The Florida Supreme Court rejected the State's argument holding that the addition of this particular aggravating circumstance was in effect a new element that could not be applied to a crime committed before its effective date as that would violate Ex Post Facto laws.[5] *Id.* Cf., *Combs v. State*, 403 So. 2d 418, 421 (Fla. 1981) (holding that newly enacted CCP aggravator could be applied to an offense committed before its enactment date without violating Ex Post Facto as the defendant had been convicted of first degree murder and CCP "only reiterates in part what is already present in the elements of premeditated murder.").

Following the Florida Supreme Court's interpretation in *Hurst v. State*, the Florida Legislature enacted Chapter 2017-1, Laws of Florida, which confirmed and incorporated the court's construction from *Hurst v. State*.[6] Since its passage, the Florida Supreme Court has held that the revised Fla. Stat. § 921.141 applies to all capital defendants regardless of the date of the offense, with the exception of cases deemed final. *See Victorino v. State*, 241 So. 3d 48 (Fla. 2018). For example, in *Card*

---

[4] The aggravator at issue involved § 921.141(5): "the victim of the capital felony was particularly vulnerable due to advance age or disability."

[5] Following *Hurst v. Florida* and *Hurst v. State*, the Florida Supreme Court has held that the revised death penalty statute can be applied to any and all capital defendants with violating Ex Post Facto Laws regardless of the date of the offense. *See Victorino v. State*, 241 So. 3d 48 (Fla. 2018).

[6] The Florida Legislature initially drafted Chapter 2016-13, Laws of Florida, which was rejected by the Florida Supreme Court as unconstitutional for failing to require unanimity. *See Perry v. State*, 210 So. 3d 630 (Fla. 2016).

v. Jones, 219 So. 3d 47, 48 (Fla. 2017), a death sentence was vacated on the basis of *Hurst v. State* because all of the facts or elements necessary to essentially convict the defendant of the highest degree of murder and authorize a death sentence had not been found proven beyond a reasonable doubt by a unanimous jury at a 1999 resentencing. The homicide at issue in Card occurred in June of 1981, and the conviction of first degree murder was final in 1984. *Card v. State*, 453 So. 2d 17, 18 (Fla. 1984); *see also*, *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (Three 1981 homicides remanded for a new penalty phase under revised Ch.2017-1).

At the time of the decision in *Hurst v. State*, however, Article X, section 9 of the Florida Constitution provided: "**Repeal of criminal statutes.** –Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." The Florida Supreme Court has explained that "the purpose of the 'Savings Clause' [wa]s to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime." *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015).[7] The homicide at issue in *Hurst v. State* occurred on May 2, 1998. Thus, when the Florida Supreme Court identified the

[7] According to the Florida Senate's Committee on Criminal Justice, all Florida senators were well aware of Florida's constitutional prohibitions on criminal laws. *See*, The Florida Senate, Issue Brief 2011-12, *Constitutional Prohibitions Affecting Criminal Laws*, https://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-212cj.pdf (last visited April 25, 2019) ("A retroactive penalty enhancement or reduction is a savings clause violation because it affects punishment for crime previously committed). Thus, to the extent that Respondent continues to rely on the lack of "expressed Legislative intent" to abrogate all prior death sentences, the argument must fail.

elements of what the State had to prove before the range of punishment included death, it was determining what the state of Florida's criminal law was on May 2, 1998, the date of the homicide for which Mr. Hurst was being prosecuted.

As noted above, prior to *Hurst v. Florida*, the Florida Supreme Court interpreted Florida law as only requiring a jury finding of the existence of an aggravator beyond a reasonable doubt *before* a defendant can be deemed eligible for the ultimate penalty—a death sentence. Yet, in reality, Florida's hybrid system never permitted jurors to consider aggravating factors during the guilt phase nor provided any mechanism to enable the jury to express its findings on aggravation (or any other factor) as other States had done to determine eligibility.[8] *See, i.e. Baldwin v. Alabama*, 472 U.S. 372 (1985) (Alabama's weighing statute required the indictment to charge the crime with aggravation and provided for an automatic death sentence

[8] For example, under Delaware's former bifurcated statute, a death sentence could only be imposed if the jury unanimously found the existence of an aggravator at the penalty phase. Moreover, the jury's finding was then binding on the judge. *See State v. White*, 395 A.2d 1082 (Del. 1978). Subsequently, the Delaware Legislature amended the statute to remove the unanimity requirement as well as the "great weight" standard the judge was required to give to the jury's advisory sentence. However, the Delaware statute still required expressed jury findings as to "death eligibility." Following a guilt phase conviction, the Delaware statute required the jury to answer two questions before proceeding to the "sentencing phase." This "eligibility phase" involving only the jury and not the judge, required the jury to specifically determine whether at least one statutory aggravator existed beyond a reasonable doubt before proceeding to the penalty phase. If no aggravator existed, the judge was then required to sentence the defendant to life imprisonment. In the wake of *Ring v. Arizona*, the Supreme Court of Delaware found its system distinguishable from Arizona's and thus constitutional because of the required jury findings at the "eligibility phase." Following *Hurst v. Florida*, however, the statute was declared unconstitutional because it did not require jury findings as to each element prescribed under state law. *See Rauf v. State*, 145 A. 3d 430 (Del. 2016).

if the jury returned a guilty verdict. Subsequently, a judge, acting alone, would perform the weighing function at a separate hearing. In addition, Alabama's statute was only upheld because the jury's "sentence" was not given weight by the judge in determining the sentence.); Cf., *Riley v. Wainwright*, 517 So. 2d 656, 659 (Fla. 1987) ("If the jury's recommendation, **upon which the judge must rely**, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.") (emphasis added).

While states such as Alabama provided a mechanism for the jury to express its findings, which the judge was then forbidden from relying upon in sentencing, Florida did the opposite: Florida required the judge to give great weight to nonexistent jury findings. *See Harris v. Alabama*, 513 U.S. 504 (1995) ("Alabama's capital sentencing scheme is much like Florida's except that [a] Florida sentencing judge is required to give the jury's recommendations "great weight," *see Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), while an Alabama judge is not."). This distinction establishes that under Florida law, death penalty eligibility has always been dependent on the findings of both judge and jury at the penalty phase. Thus, any argument that Florida jurors made "death eligibility" determinations at the guilt phase is disingenuous at best and reveals the untenability of Florida's capital sentencing scheme. But, more importantly, the Florida Supreme Court's former interpretation of state law establishes that *Hurst v. State* provided a new statutory construction of a statute which has been in existence since 1973 and the Legislature confirmed that construction.

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 *Hurst v. State*, the Florida Supreme Court reviewed the statute and *identified additional findings* which it considered to be elements that must be found by the jury beyond a reasonable doubt in order to "convict of capital murder." Thus, in order to be convicted of the higher substantive offense of capital murder under Florida law, and thus be eligible for a death sentence, the elements identified in *Hurst v. State* as stemming from § 921.141 must be found in addition to the elements in § 784.02 (1). *See Hurst v. State*, 202 So. 3d at 53; *see also*, *State v. Dixon*, 283 So. 2d at 9. Under *Jones v. United States*, these elements must be proven by the State beyond

a reasonable doubt. 526 U.S. 227, 232 (1999) ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.").[9]

The Florida Supreme Court's analysis in *Foster v. State* reveals its focus on statutory language at the expense of function. Had the court conducted a proper analysis, it would have been apparent that the statutorily defined facts identified in *Hurst v. State* operate not only to elevate the offense of first degree murder to include a sentence of death, they also operate to narrow the scope of the death penalty's applicability under Florida law. Thus, these factors—whether the statute calls them eligibility factors, sentencing factors, or Mary-Jane—are elements which are essential to obtaining an accurate conviction of "capital murder" under Florida's substantive law. *See Ring*, 536 U.S at 610 (Scalia, J., concurring) (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

[9] To the extent the State seeks to rely on *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017), for the proposition that this Court has rejected the idea that the "weighing function" constitutes an element, Rodriguez submits that Florida's statute is distinguishable. Ohio's statute, unlike Florida's, tasked the jury with finding the aggravators established beyond a reasonable doubt at the guilt phase. Accordingly, in Ohio, a jury's expressed findings at the guilt phase are what make a defendant "death eligible." While an Ohio jury subsequently performs the weighing function at the penalty phase, under Florida law the jury does not make any findings until it reaches the penalty phase. As a result, *Jenkins v. Hutton* is inapplicable here.

be found by the jury beyond a reasonable doubt).

Accordingly, under Florida law, the crime of "capital murder" was created in 1973 with the passage of the legislatures new death penalty statute and the court's confirmation and interpretation of that statute in *State v. Dixon*, 283 So. 2d at 9.[10] Consequently, the Florida Supreme Court's rationale in *Foster v. State*—that the statutory drafting establishes that these are not "elements"—is indistinguishable from the rationale in *Ring v. Arizona*. Whether Florida chooses to label its substantive offense as "capital murder" or "first degree murder," is irrelevant to the inquiry of whether a due process violation occurred. Florida cannot continue to evade the strictures of *Winship* by characterizing the elements in § 921.141 as factors that bear solely on the punishment. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975) ("The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.").

In *Winship*, this Court held that "the Due Process Clause protects the accused

---

[10] When the Florida Supreme Court grappled with *Furman v. Georgia*'s impact in *Donaldson v. Sack*, it defined the term "capital offense" as an offense which is "punishable by death." 265 So. 2d 499 (Fla. 1972). The court concluded that because there is no "capital punishment in this state, there are no capital offenses." *Id.* at 502. Accordingly, when Florida reinstated the death penalty, it established the separate offense of "capital murder."

against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. This Court also explained in *Mullaney v. Wilbur*, "if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U.S. at 698. The Florida Supreme Court's holding undermines Rodriguez's due process interests and ignores that these interests are implicated to a greater degree here than in *Winship* itself as he stands to lose his life as a penalty.

In *Fiore v. White*, 531 U.S. 225, 226 (2001), this Court addressed the import of the Due Process Clause in the context of 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.

See also, Bunkley v. Florida, 538 U.S. 835, 841-42 (2003) ("The proper question under *Fiore* is not just whether the law changed. Rather, it is when the law changed. The Florida Supreme Court has not answered this question; instead, it appeared to assume that merely labeling L.B. as the 'culmination' in the common pocketknife exception's 'century-long evolutionary process' was sufficient to resolve the *Fiore* question. 833 So. 2d, at 745. It is not. Without further clarification from the Florida Supreme Court as to the content of the common pocketknife exception in 1989, we cannot know whether L.B. correctly stated the common pocketknife exception at the time he was convicted.").

Like in *Fiore*, in *Hurst v. State*, the Florida Supreme Court read the plain language of the statute and identified the statutorily defined facts necessary to increase the authorized punishment to a death sentence and thus convict of the higher offense of capital murder. The subsequent enactment of Chapter 2017-1 confirmed the court's statutory construction in *Hurst v. State*. Accordingly, the decision in *Hurst v. State* merely identified and confirmed the substantive law in the statute. *See also*, *Vaught v. State*, 410 So. 2d 147 (Fla. 1982); *Morgan v. State*, 415 So. 2d 6, 11 (Fla. 1982); *Hootman v. State*, 709 So.2d 1357, 1360 (Fla. 1998). And under *Fiore*, the elements identified in *Hurst v. State* and confirmed by Chapter 2017-1 as substantive law, date to statutory enactment. *See Bousley v. United States*, 523 U.S. 614, 625 (1998).

The substantive implications of this are further supported by the fact that the new "penalty phases" provided to capital defendants who have received *Hurst* relief will be governed by the revised § 921.141. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017) (1981 homicide); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (Three 1981 homicides). Under the revised § 921.141, a death sentence is not authorized when the defendant has only been convicted of first degree murder. Without the State proving beyond a reasonable doubt the substantive elements of capital murder, *i.e.* first degree murder plus the additional facts necessary to authorize a death sentence, the only available sentence for a defendant convicted of first degree murder is life imprisonment. Accordingly, these new "penalty phases" will functionally be guilt phase trials as to whether Mr. Card and Mr. Johnson are guilty of capital murder,

the higher degree of murder for which death is authorized as punishment.

As it stands now, Mr. Rodriguez has not been properly convicted of capital murder as that crime has been defined under Florida substantive criminal law.[11] The definition of capital murder set forth in *Hurst v. State* and appearing in Chapter 2017-1 is being applied to the criminal prosecutions of murders committed prior to Mr. Rodriguez's. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). Mr. Rodriguez's crime occurred in 1984 and remained a cold case until a relative of his codefendant called crime stoppers in 1992 seeking a $50,000 reward. Mr. Rodriguez's convictions became final in 2000 following *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The State was not held to prove the elements of capital murder beyond a reasonable doubt to the satisfaction of a unanimous jury. Mr. Rodriguez's sentences stand even though he was not properly convicted of capital murder, while Mr. Card and Mr. Johnson will not receive death sentences for murders committed earlier unless the elements of capital murder are proven beyond a reasonable doubt and their juries return verdicts convicting them of the higher substantive offense.

Certiorari review is warranted here to determine whether the Due Process Clause requires that the substantive criminal law identified in *Hurst v. State* and confirmed as still in existence with the enactment of Chapter 2017-1, be applied to

[11] The trial court's decision to find Mr. Rodriguez guilty of an additional crime, which was not expressed in the jury verdict, and to use that crime (robbery) as support for an additional aggravator, further supports Mr. Rodriguez's claim that his due process rights were violated.

Mr. Rodriguez's case. The 1973 enactment of Fla. Stat. § 921.141 went beyond guiding the jury's new role in capital sentencing. The statute also provided statutorily defined facts which the Legislature determined were necessary to define a substantive offense subject to the death penalty. In determining that a death sentence required jury findings as to the elements of first degree murder, *see* Fla. Stat. § 782.04 (1), in addition to the facts identified in Fla. Stat. § 921.141, the Legislature effectively created a greater substantive offense, *i.e.* capital murder. This Court should address whether the Florida Supreme Court's decision in *Foster v. State* is inconsistent with *Hurst v. State* and whether its application here constitutes a denial of Federal Due Process under the Eighth and Fourteenth Amendments.

Respectfully submitted,

MARIE-LOUISE SAMUELS PARMER
Special Assistant CCRC-S
Florida Bar No. 0066850
**Counsel of record*

MARTA JASZCZOLT
Staff Attorney
Florida Bar No. 119537
jaszczoltm@ccsr.state.fl.us
CCRC-SOUTH
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284
(954) 713-1299 (fax)
COUNSEL FOR PETITIONER

May 13, 2019