DOCKET NO. 18-9366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MICHAEL T. RIVERA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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Petitioner, MICHAEL T. RIVERA, 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

A. Respondent's Obfuscation in the Brief in Opposition

In Respondent's statement of the Question Presented for Review, the obfuscation of the issues before this Court begins:

Whether certiorari should be denied where the retroactive application

> of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds and when Petitioner has failed to establish that state and federal courts are in conflict or that this issue presents an important unsettled question of federal law that this Court should resolve.

(BIO at i).

B. The Petition Filed by Petitioner Does Not Concern Hurst v. Florida *or its Retroactivity*

Respondent's statement of the Question Presented for Review implies that the questions Petitioner has presented to this Court include a contention that he seeks the retroactive application of *Hurst v. Florida* to his death sentence. However, the actual subject of Petitioner's petition is the claim that the statutory construction of § 921.141, Fla. Stat., set out by the Florida Supreme Court in *Hurst v. State*, constitutes a change in Florida's substantive criminal law. In his petition, Petitioner sought to distinguish his questions presented from those many other petitioners have filed challenging the Florida Supreme Court's decision to not apply *Hurst v. Florida* to any death sentences final before June 24, 2002. (Petition at 22, 23).

C. The Florida Supreme Court Did Not Procedurally Bar Petitioner's Hurst v. State *Claim*

In its statement of the Question Presented for Review, Respondent suggests that the Florida Supreme Court denied Petitioner's appeal on "adequate independent state grounds." (BIO at i). Frequently, the reference to a denial on the

basis of adequate and independent state grounds is an argument based upon the state court's application of a procedural bar arising under state law which precludes review of the merits of a petitioner's constitutional claim. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977). However, that is not the situation here. The Florida Supreme Court denied Petitioner's appeal on the merits. *Rivera v. State,* 260 So. 3d 920, 928 (Fla. 2018) ("Because the crux of Rivera's argument is centered on this Court retroactively applying *Hurst* to Rivera's case, which became final in 1990, we conclude that this issue is **meritless**.") (emphasis added).

D. Most of the Brief in Opposition Focuses on the Retroactivity Decision Regarding Hurst v. Florida

Most of the "Reason For Denying The Writ" section of Respondent's Brief in Opposition concerns the Florida Supreme Court's retroactivity analysis of *Hurst v. Florida*, a Sixth Amendment ruling. (BIO at 7-19). Within this discussion of *Hurst v. Florida*, Respondent also discussed to some extent the constitutional ruling in *Hurst v. State*. (BIO at 7) ("The Florida Supreme Court rejected Rivera's claim that he was entitled to retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert denied*, 137 S. Ct. 2161 (2017). Also rejected were Rivera's Eighth and Fourteenth Amendment challenges to *Hurst's* established partial retroactivity analysis.").

However, Petitioner seeks certiorari review on the Florida Supreme Court's ruling as to the second argument set out in his initial and reply briefs before that

court. Before rejecting the argument on the merits, the Florida Supreme Court discussed Petitioner's second argument as follows:

> In his second claim, Rivera attempts to circumvent our decision on the retroactivity of *Hurst* by dubbing the death penalty statute as substantive, rather than procedural. In doing so, Rivera cites to *Fiore* and *In re Winship* in support of his argument that *Hurst* relief should be applied retroactively because the substantive aggravators were present in the statute since its creation, thus warranting full retroactive application of *Hurst*. These arguments, however, are "nothing more than arguments that *Hurst v. State* should be applied retroactively to [Rivera's] sentence, which became final prior to *Ring*. As such, these arguments were rejected when [this Court] decided *Asay*." *Hitchcock*, 226 So. 3d at 217. Therefore, we conclude that this claim is meritless, based on our clear and repeated precedent on the retroactive application of *Hurst*.

Rivera v. State, 260 So. 3d at 927 (footnotes omitted).

E. The Issue Below on Which Certiorari Review Is Sought

Thus, the issue raised by Petitioner in the Florida Supreme Court was whether the statutory construction portion of the decision in *Hurst v. State* was a change in Florida's substantive criminal law. Petitioner identified the portion of the decision in *Hurst v. State* that he contended constituted such a change:

> In *Hurst v. State*, this Court held:
>
> > **[A]ll the findings necessary for imposition of a death sentence are "elements"** that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are**

> **sufficient** to impose death, **unanimously find that the aggravating factors outweigh** the mitigating circumstances, and **unanimously recommend a sentence of death.** We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. *See Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000).

Id. at 57-58.

(Initial Brief at 15-16). Petitioner then argued:

> Given the statutory construction in *Hurst v. State*, the Due Process Clause and the holding in *In re Winship*, 397 U.S. 358 (1970) require that elements of the higher degree of murder to be proven 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).

(Initial Brief at 16-17).

Petitioner then discussed *Fiore v. White*, 531 U.S. 225 (2001). Relying on *Fiore*, Petitioner argued:

> Just as in *Fiore*, this Court's decision in *Hurst v. State* looked at the plain language of Florida's death penalty statute and identified the statutorily defined facts (or elements) necessary to convict of capital first degree murder:
>
> > We also conclude that, just as elements of a crime must be

> found unanimously by a Florida jury, all 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.
>
> *Hurst v. State*, 202 So. 3d at 53-54 (emphasis added). These "elements" appear in the statute's plain language. The "elements" were in the statute when it was enacted in 1972. This means that the decision in *Hurst v. State* did not create a new rule of procedure. It identified substantive criminal law. Under *Fiore*, the substantive criminal law defining the elements of capital murder dates to the statute's enactment.

(Initial Brief at 19) (footnote omitted).

Petitioner then argued:

> Rivera's jury was not instructed on the need to find three of the four elements of capital first degree murder beyond a reasonable doubt, i.e. 1) the aggravators were sufficient, 2) the aggravators outweighed the mitigators, and 3) no basis for a single juror to be merciful and vote to impose a life sentence existed. The failure to instruct on the need to find all elements of a criminal offense beyond a reasonable doubt violates the Due Process Clause. Under *Fiore*, the substantive criminal law identified in *Hurst* and confirmed by Chapter 2017-1 must be applied as of the date of the statute's enactment which plainly identified the elements. Law governing the retroactivity of a new procedural rule does not govern as to substantive law.

(Initial Brief at 22-23). Prior to issuance of *Hurst v. State*, neither the judge nor the jury were instructed that these three factual matters had to be proven by the State beyond a reasonable doubt. Contrary to Respondent's assertion, it is not just a matter of who is the fact finder, the judge or the jury. After *Hurst v. State*, due process requires proof beyond a reasonable doubt of the statutorily identified facts.

In his reply brief, Petitioner set out the position that the State of Florida took in its answer brief:

> The State's position here is that this Court did not mean what it said in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):
>
> > In *Hurst*, this Court held that to impose a death penalty a jury must find that the required penalty phase fact-finding included not only that the aggravators are proven beyond a reasonable doubt, but also that the aggravating factors are sufficient to impose death, and that the aggravating circumstances outweigh the mitigating circumstances. **In its analysis, this Court made the analogy that these factors were like "elements," however it distinguished elements of a crime from sentencing factors using phrases such as: "just as elements of a crime" (p.53); "these findings occupy a position on par with elements of a greater offense" (p.57) (emphasis added); and using quotation marks around the word "elements"** (p.57). The fact that this Court analogized a critical sentencing factual finding with an element did not turn the sentencing factor into an actual element of the crime. While each of the three sentencing factors are now required findings, it is not logical or appropriate to equate them with the actual elements of an offense.
>
> (AB at 8) (emphasis elements).

(Reply Brief at 5). The dissent in *Hurst v. State* in stating it disagreement with majority's conclusion that the statutorily defined facts were elements shows that the majority's use of the word "element" in *Hurst v. State* was knowing and intentional.

In his reply brief, Petitioner also addressed the State of Florida's argument in its answer brief that "*Fiore* is inapplicable to the case before the Court." (Reply

Brief at 10). He then argued that the State had overlooked *Bunkley v. Florida*, 538 U.S. 835 (2003).

F. The Florida Supreme Court's Ruling in Rivera v. State

The Florida Supreme Court rejected Petitioner's argument by citing its decision in *Hitchcock v. State,* 226 So. 3d 216, 217 (Fla. 2017), where it stated:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002).

See Rivera v. State, 260 So.3d at 927 (citations omitted). It is clear that what the Florida Supreme Court was addressing in *Hitchcock* was the retroactivity of the Sixth Amendment ruling in *Hurst v. Florida*. An examination of *Asay v. State*, 210 So. 3d 1 (Fla. 2016), further demonstrates that what the Florida Supreme Court considered was whether *Hurst v. Florida* was retroactive under the analysis for constitutional rulings that were procedural in nature. *Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Asay v. State*, 210 So. 3d at 15-22.

The Florida Supreme Court did not address whether the statutory construction set out in *Hurst v. State* constituted substantive criminal law. Moreover, the court did not address Petitioner's arguments based upon *Fiore*, *Bunkley*, and *Winship*. Rather, it simply relied upon the *Witt* analysis conducted in *Asay v. State*, which was in turn relied upon in *Hitchcock v. State*.

G. *Respondent's Response to Petitioner's Assertion That* Hurst v. State *Changed Substantive Law*

On page 19 of its Brief in Opposition, Respondent turns to Petitioner's contention that the statutory construction of § 921.141 set out in *Hurst v. State* was a change in Florida's substantive criminal law. Respondent asserts that *Fiore* and *Bunkley* are inapplicable here because retroactivity was not at issue in those cases. That is simply not true.

For example, in *Bunkley* the Florida Supreme Court had refused to apply a change in the construction of a criminal statute retroactively by employing the *Witt* retroactivity analysis. This Court reversed, finding that the *Witt* analysis did not resolve whether under the Due Process Clause, the change in Florida's substantive criminal law governed in Bunkley's case. (BIO at 20).

Respondent's analysis comes down to its assertion that "*Hurst* remains a procedural change not a substantive one." (BIO at 20). For this, Respondent relies on *Schriro v. Summerlin*, 542 U.S. 348 (2004). However, Respondent's reliance on *Schriro v. Summerlin* is misplaced. There, this Court explained: "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)." *Schriro v. Summerlin*, 542 U.S. at 351-52. When a judicial decision announces a change in

substantive criminal law by ruling that an additional fact over and above the previously recognized elements of a criminal offense must be proven to increase the range of punishment, such a change is substantive and carries constitutional implications that generally require retroactive application.[1]

H. The Question of When a Judicial Ruling Constitutes a Change of Substantive Law Warrants Certiorari Review

The substantive versus procedural dichotomy is a matter of considerable importance. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court construed a federal criminal statute enacted in 1986 to include an element that courts had not anticipated. In his dissent, Justice Alito noted that the statutory construction adopted in *Rehaif* meant that those who were convicted under the statute and were still imprisoned would now be able challenge their convictions, even if the conviction is final and the challenge had to be presented in a habeas petition:

> Those for whom direct review has not ended will likely be entitled to a new trial. Others may move to have their convictions vacated under 28 U.S.C. § 2255, and those within the statute of limitations will be entitled to relief if they can show that they are actually innocent of

[1] In *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019), the Eleventh Circuit held that the decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), was a substantive ruling in that it narrowed the scope of a criminal statute by declaring a portion of the statute unconstitutional. Because the ruling altered the substantive law, *Davis* was held to apply retroactively. *See also Welch v. United States*, 136 S. Ct. 1257, 1261 (2016) (holding that the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), was "a substantive decision that is retroactive in cases on collateral review").

> violating § 922(g), which will be the case if they did not know that they fell into one of the categories of persons to whom the offense applies. *Bousley v. United States*, 523 U.S. 614, 618–619, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998). If a prisoner asserts that he lacked that knowledge and therefore was actually innocent, the district courts, in a great many cases, may be required to hold a hearing, order that the prisoner be brought to court from a distant place of confinement, and make a credibility determination as to the prisoner's subjective mental state at the time of the crime, which may have occurred years in the past.

Id. at 2213 (Alito, J., dissenting).

I. Recent Concession by Respondent in an Appeal Pending in the Florida Supreme Court

Reed v. State, Case No. SC19-714, is an appeal currently pending before the Florida Supreme Court. In his response to the court's Order to Show Cause, Reed presented Petitioner's argument regarding *Hurst v. State* announcing a change in Florida's substantive law. In its Reply to Response to Order to Show Cause filed on June 4, 2019, the State conceded that the retroactivity analysis set out in *Witt v. State* was not to be used with a judicial ruling announcing a change in the construction of a criminal statute. *See* Appendix A (Reply to Response to Order to Show Cause at 6, *Reed v. State*, Case No. SC19-714) ("*Witt* limits retroactivity analysis to decisions that are 'constitutional in nature,' thereby excluding statutory interpretation decisions from its ambit."). This concession calls into question the Florida Supreme Court's rejection of Petitioner's arguments on the basis of the *Witt* analysis conducted in *Asay v. State*.

J. *Respondent's Reliance on* **Foster v. State**

Without referencing the language in *Hurst v. State* describing the statutorily identified facts necessary to increase the range of punishment to include a death sentence, Respondent states:

> Rivera supports his claim by continuing the untenable argument that *Hurst [v. State]* changed the elements of capital murder. It did not. This argument is not based on current decisions, and instead focuses on **an outdated statement** which has been clarified. "[T]he *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder." *Foster v. State*, 258 So. 3d 1248 (Fla. 2018).

(BIO at 22) (emphasis added). Respondent does not address what it refers to as "an outdated statement." Presumably it is the language in *Hurst v. State* specifically calling the statutorily identified facts elements. It would appear that Respondent wants to argue that *Foster v. State* overruled *Hurst v. State*.

But if *Hurst v. State* was a change in Florida's substantive law, seemingly Respondent is contending that *Foster v. State* overturned the ruling in *Hurst v. State*, and thus itself constituted a change in Florida's substantive criminal law. However, relying on *Foster* to argue that Petitioner is not entitled to the benefit of *Hurst v. State* would be advancing an argument that would result in a clear violation of the Ex Post Facto Clause.

In any event, the language in *Foster v. State* itself demonstrates how the statutorily identified facts function. While refusing to label these facts as

"elements," the Florida Supreme Court in *Foster* did acknowledge that these facts had to be found before a judge could impose a death sentence:

> 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. Rather, they **are findings required** of a jury: (1) ***before* the court can impose the death penalty** for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred.

Foster v. State, 258 So. 3d 1248, 1252 (Fla. 2018) (emphasis added). While the Florida Supreme Court in *Foster* chose to withhold the "elements" label, it recognized the requirement that there must be findings of the statutorily identified facts over and above a first degree murder conviction before a judge can impose a death sentence on an individual convicted of first-degree murder.

As Justice Scalia explained, what matters is not the label that a state places on the required facts, but rather their function. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("[T]he 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."). What *Foster* describes as the function of the statutorily identified facts demonstrates that the State must prove the existence of the facts beyond a reasonable doubt because they are functioning as elements

necessary to increase the range of available punishment to include a death sentence.

CONCLUSION

Based on the forgoing and based on his Petition for a Writ of Certiorari, Petitioner respectfully asks this Court to grant the Petition and issue the writ in order to review the questions presented.

Respectfully submitted,

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