No. _____

OCTOBER TERM 2018

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES FINNEY,

Petitioner,

v.

JULIE JONES, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FLORIDA SUPREME COURT

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

This Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) invalidated Florida's capital sentencing scheme which had been in effect since December 8, 1972. On remand in *Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016), the Florida Supreme Court took the opportunity to review its capital sentencing scheme and attempt to correct deficiencies which this Court had not reached. Informed by this Court's ruling in *Hurst v. Florida* that the Sixth Amendment right to a jury trial required that under Florida's capital sentencing scheme the jury must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty, the Florida Supreme Court analyzed what those facts were:

> These necessary facts include, of course, each aggravating factor that the jury finds to be proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury…[U]nder Florida law, 'The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances.'…Thus, 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.

Hurst v. State, 202 So. 3d at 53. (citations omitted) (Florida Supreme Court's emphasis). Noting the history in Florida of requiring unanimous jury verdicts as to elements of a crime, the Florida Supreme Court then 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 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.

Id. at 57-58. (emphasis added).

The Florida Supreme Court's opinion in *Hurst v. State* interpreted Fla. Stat. § 921.141 and found that it identified the 'elements' of capital murder that a jury was required to find to essentially "convict" someone 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**. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge."

Id. at 53-54. In doing so, the Florida Supreme Court thus recognized that "capital murder" is a higher offense than first degree murder, with additional elements that must be found by a jury. The Florida Supreme Court further recognized that these

elements of the substantive crime of capital murder were **longstanding and appeared in the statute**. *See id.* at 53 ("As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh the mitigating circumstances.' *Id.* at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).") (emphasis added).

Following *Hurst v. State*, Chapter 2017-1, Laws of Florida was enacted on March 13, 2017. It revised § 921.141 by confirming and incorporating the Florida Supreme Court's interpretation of the statute in *Hurst v. State* and the elements necessary for the range of punishment to include death. *See Foster v. State*, 258 So. 3d 1248, 1251 (Fla 2018). ("section § 921.141, Florida Statutes, which was revised to incorporate the *Hurst* requirements; and chapter 2017-1, Laws of Florida, which amended section 921.141 to require that a jury's recommendation of death be unanimous."). The Florida Legislature's enactment of Chapter 2017-1 and revision of Fla. Stat. § 921.141 served as a confirmation of the Florida Supreme Court's findings in *Hurst v. State* and the incorporation of the Court's pronouncement that the necessary elements arise from the statute and have been present since its enactment. *Hurst v. State* did not create a new rule but merely identified the substantive law set forth in the previously enacted version of § 921.141.

At the time of the decision in *Hurst v. State*, Article X, section 9 of the Florida Constitution provided that repeal or amendment of a criminal statute shall not affect the prosecution or punishment for any crime that had been previously committed.

Florida's Savings Clause's purpose was to "require that 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). The homicide at issue in *Hurst v. State* occurred on May 2, 1998. When the Florida Supreme Court identified the elements of what the State was required to prove before the range of punishment could be elevated to death, it was determining what the state of Florida's criminal law was on May 2, 1998, that date of the crime for which Mr. Hurst was being prosecuted.

Subsequently, in another case, *Card v. Jones,* 219 So. 3d 47, 48 (Fla. 2017), the Florida Supreme Court vacated a death sentence on the basis of *Hurst v. State* because all of the facts or elements necessary to 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 Card's 1999 resentencing. The homicide for which Mr. Card was being prosecuted occurred in June 1981 and his conviction for first degree murder was final in 1984. *Card v. State*, 453 So. 2d 17, 18 (Fla. 1984).[1]

Despite the acknowledgment by the Florida Supreme Court and the Florida Legislature that these 'elements' were longstanding and were required to be found unanimously by a jury in order to convict a capital defendant to death, Mr. Finney's jury was not instructed nor did it make any of the requisite findings. Mr. Finney's

[1] In addition to Mr. Card, the Florida Supreme Court has applied the statutory construction announced in *Hurst v. State*, vacated death sentences, and ordered new "penalty phases" in cases in which the homicides occurred before the homicide in Mr. Finney's case. *See e.g., Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (crime occurred January 1981).

crime occurred in 1991 and his conviction and sentence became final on January 22, 1996 when this Court denied his Petition for Writ of Certiorari. *See Finney v. Florida*, 116 S. Ct. 823 (1996). Yet, when seeking the benefit of collateral relief based on the decision in *Hurst v. State*, the Florida Supreme Court ruled that he was not entitled to relief because his death sentence had become final prior to June 24, 2002, the date of *Ring v. Arizona*, 536 U.S. 584 (2002). This despite the fact that the capital sentencing statute in effect at the time of the crime, as interpreted by *Hurst v. State,* had long required unanimous jury findings on all elements required under § 921.141 in order to sentence someone to death.

The Unresolved Questions

1) Whether Petitioner was denied his rights under the Due Process Clause and Eighth Amendment where the Florida Supreme Court refused to apply the statutory construction of Fla. Stat. § 921.141 which it announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) that before death was a possible sentence, the State had to prove beyond a reasonable doubt the existence of aggravating factors, the sufficiency of the aggravators, and that they were not outweighed by mitigating circumstances?

2) Whether the Florida Supreme Court's application of its statutory construction of § 921.141 in *Hurst v. State* to homicide prosecutions in which the crimes at issue were committed prior to the date of Mr. Finney's crime violates Equal Protection and/or the prohibition against *ex post facto* laws?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CHARLES FINNEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, **CHARLES FINNEY,** is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Florida Supreme Court. *Finney v. State*, 260 So. 3d 231 (Fla. 2018).

CITATIONS TO OPINION AND ORDERS BELOW

The opinion of the Florida Supreme Court in this cause, reported as *Finney v. State of Florida*, 260 So. 3d 231 (Fla. 2018), is attached as "Appendix A" to this Petition. The order denying successive motion for postconviction relief in the circuit court is attached as "Appendix B."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a) and 2101 (d). The Florida Supreme Court issued its decision on December 28, 2018. Counsel sought an additional 60 days for filing of this Petition, which was granted by Justice Thomas on March 20, 2019 and extended the time for filing this petition up to and including May 27, 2019. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

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

The Fourteenth Amendment to the United States Constitution provides in pertinent 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.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

In this Petition Mr. Finney is requesting the Court grant certiorari to review the decision of the Florida Supreme Court rejecting his claim that his sentence of death is unconstitutional in violation of the Due Process Clause and the Eighth Amendment where his jury did not return findings of fact unanimously and beyond a reasonable doubt of all the requisite elements necessary to convict him of capital first degree murder pursuant to Fla. Stat. § 921.141. Mr. Finney will present a brief summary of the relevant facts pertinent to the issue below.

A. Mr. Finney's Procedural and Factual Background

On February 13, 1991 Mr. Finney was indicted for first degree murder, robbery with a deadly weapon, sexual battery, and trafficking in stolen property. He pled not guilty to all charges. On September 14, 1992 a trial was held and Mr. Finney was found guilty of first degree murder, sexual battery, and trafficking in stolen property. (T. 756-58). Mr. Finney's penalty phase was held on September 18, 1992 and the jury returned a 9-3 recommendation for death. Thereafter, a *Spencer*[2] hearing was held on November 10, 1992 and Mr. Finney was sentenced to death. The trial court found the following aggravators: prior conviction of a felony using force or the threat of violence; that the capital felony was committed for pecuniary gain; and the crime was especially heinous, atrocious, and cruel. (PCR. 122-24). The trial court also found the following non-statutory mitigators: good work and military history; positive character traits; honorable service and discharge from the military; and potential for

[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

rehabilitation. (PCR. 124-25).

Mr. Finney's convictions and sentence were affirmed by the Florida Supreme Court on direct appeal. *Finney v. State*, 660 So. 2d 674 (Fla. 1995). Mr. Finney filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied on January 22, 1996. *Finney v. Florida*, 116 S. Ct. 823 (1996).

Following affirmance on direct appeal, on March 31, 1997 Mr. Finney filed a Fla. R. Crim. Pro. 3.850 Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend in the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. (PCR 128-154). Thereafter, on April 16, 1998 Mr. Finney filed an Amended Rule 3.850 Motion to Vacate Judgment of Convictions and Sentences raising five issues.[3]

The court subsequently summarily denied Mr. Finney's 3.850 motion. Mr. Finney filed a motion for rehearing which was denied. A notice of appeal to the Florida Supreme Court was timely filed. During the pendency of the appeal, Mr. Joseph Hobson replaced Mr. Crooks as counsel for Mr. Finney. On October 30, 2000 Hobson filed a Motion to Remand Jurisdiction to Circuit Court and Postpone the Briefing Schedule. (PCR. 193). The basis for Hobson's motion was that predecessor counsel for Mr. Finney in postconviction had not fully pled all of the available issues

[3] Mr. Finney's Amended 3.850 Motion raised five issues: 1) ineffective assistance of counsel at guilt and penalty phase; 2) improper jury instructions; 3) newly discovered evidence showing that Mr. Finney's conviction and sentence were unreliable; 4) Mr. Finney's sentence of death was unconstitutional because it rests on an automatic aggravating factor; and 5) the unconstitutionality of Florida's capital sentencing scheme. (PCR. 156-86).

and Mr. Finney prayed for an opportunity to raise those issues below.[4]

The Florida Supreme Court denied the motion to relinquish jurisdiction. On October 31, 2000 the circuit court issued an order *nunc pro tunc* Denying Defendant's First Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. Following that order, on November 7, 2000 Mr. Finney filed an Amended Motion to Relinquish Jurisdiction to the Circuit Court and Postpone the Briefing Schedule. (PCR. 197). Mr. Finney's Initial Brief in the Florida Supreme Court was then filed on February 13, 2001[5] and his state habeas petition was filed 6 days later on February 19, 2001. (PCR. 211).

The Florida Supreme Court affirmed the summary denial of Mr. Finney's Rule 3.850 motion for postconviction relief on September 26, 2002. *Finney v. State*, 831 So. 2d 651 (Fla. 2002). In affirming the summary denial, the Florida Supreme Court also denied Mr. Finney's claim regarding the ineffective assistance of postconviction counsel. Counsel for Mr. Finney filed a motion for rehearing, along with Mr. Finney also filing a *pro se* motion for rehearing, both of which were denied by the Florida Supreme Court on December 23, 2002.

A federal habeas petition was timely filed by Mr. Finney on January 14, 2003. (PCR. 296)(DE 10). An Amended Petition for Writ of Habeas Corpus was then filed

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[4] Mr. Finney's original Rule 3.850 motion was a mere 30 pages in length.

[5] Included in Mr. Finney's Initial Brief was a claim alleging error by the circuit court below for failing to ensure effective assistance of counsel in postconviction. (PCR. 248).

on July 21, 2003.(DE 23).[6]

Prior to the filing of his amended habeas petition in United States Middle District Court, Mr. Finney filed a Successive Motion to Vacate Judgement of Conviction and Sentence on July 8, 2003. Mr. Finney's successive motion raised two claims: 1) a claim alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and 2) a claim alleging a conflict of interest with Mr. Finney's original postconviction counsel. The circuit court summarily denied Mr. Finney's successive motion for postconviction relief and the Florida Supreme Court affirmed without written opinion. *Finney v. State*, 907 So. 2d 1170 (Fla. 2005). (PCR. 302).

Mr. Finney's federal habeas petition was denied by the United States District Court on July 5, 2006. An Amended Order denying relief was subsequently filed on July 17, 2006. *Finney v. McDonough*, 2006 WL 2024456 (M.D. Fla. July 17, 2006) (DE 44). Mr. Finney timely filed a Notice of Appeal (DE 46) and Application for Certificate of Appealability, (DE 48) which was denied by the District Court on August 14, 2006. (DE 49).

Mr. Finney submitted an application for Certificate of Appealability to the Eleventh Circuit Court of Appeals which was subsequently denied. On November 9, 2006 Mr. Finney filed a Motion for Reconsideration for Certificate of Appealability which was also denied by a three-judge panel. A Petition for Writ of Certiorari to the United States Supreme Court was filed on February 5, 2007 and subsequently denied

[6] Among the claims included in the amended petition was a claim challenging Mr. Finney's sentence pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002).

on June 11, 2007. *Finney v. McDonough*, 127 S. Ct. 2944 (2007).

On June 20, 2007 Mr. Finney filed his second successive postconviction motion raising challenges to lethal injection protocols and a newly discovered evidence claim based on a comprehensive report by the American Bar Association on Florida's death penalty system. The successive motion was summarily denied by the circuit court and affirmed by the Florida Supreme Court. *Finney v. State*, 18 So. 3d 527 (Fla. 2009).

On November 29, 2010, Mr. Finney filed a third successive post-conviction motion, arguing that *Porter v. McCollum*, 130 S. Ct. 447 (2009) required the court to reassess his ineffective assistance of counsel claim. The circuit court summarily denied the motion. Mr. Finney timely appealed to the Florida Supreme Court which affirmed the summary denial below. *Finney v. State*, 91 So. 3d 781 (Fla. 2012).

A motion to withdraw was then filed by Mr. Finney's attorney, Ms. Pam Izakowitz, which was subsequently granted and CCRC-South was appointed by the circuit court to represent Mr. Finney. On May 27, 2014, after extensive public records litigation and disclosure, Mr. Finney then filed a Successive Motion To Vacate Judgment And Sentence With Special Request For Leave To Amend Pursuant To Rule 3.851. (PCR. 84-339). Thereafter, on January 5, 2015 Mr. Finney filed an Amended Successive Motion To Vacate Judgment And Sentence With Special Request For Leave To Amend Pursuant To Rule 3.851. (PCR. 606-892).[7] The circuit

[7] Mr. Finney's successive motion raised two claims: 1) a claim pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963) and/or *Giglio v. United States*, 405 U.S. 150 (1972) that Mr. Finney had been denied his right to a reliable adversarial testing due to the state's withholding of exculpatory evidence and 2) a claim pursuant to *Trevino*

court conducted a case management conference on March 27, 2015 and on April 13, 2015 the circuit court issued its order summarily denying Mr. Finney's motion for postconviction relief. Mr. Finney then timely filed his notice of appeal on May 14, 2015.

Mr. Finney filed his Initial Brief in the Florida Supreme Court on July 28, 2015 and was denied relief on December 7, 2015. *Finney v. State*, 192 So. 3d 36 (Fla. 2015). Mr. Finney then filed a motion for rehearing on December 22, 2015. While that motion remained pending, on January 12, 2016 this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) was issued. Thereafter, the Florida Supreme Court denied Mr. Finney's motion for rehearing on February 1, 2016. Following that denial, on October 14, 2016 the Florida Supreme Court issued its opinion in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

Following the *Hurst* decisions, and subsequent case law from the Florida Supreme Court related to those decisions, the Florida Legislature revised Florida's capital sentencing scheme and enacted Chapter 2016-13. Based on those revisions, Mr. Finney then filed a successive motion for postconviction relief on January 11, 2017. Mr. Finney's successive motion argued that his death sentence was unconstitutional because the judge, not the jury, made the factual findings required to impose death and because the jury's recommendation in his case was 9-3 and not unanimous. Additionally, Mr. Finney argued the *Hurst* decisions should be applied

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v. Thaler, 133 S. Ct. 1911 (2013) that collateral counsel had rendered deficient performance.

retroactively to his case under state and federal law, specifically invoking the Sixth, Eighth, and Fourteenth Amendments. The circuit court denied relief on April 27, 2017. On May 26, 2017 Mr. Finney timely filed a notice of appeal to the Florida Supreme Court.

On September 25, 2017 the Florida Supreme Court issued an Order to Show Cause, directing Mr. Finney to show why the circuit court's denial of his Rule 3.851 motion should not be affirmed in light of its recent decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Mr. Finney then timely submitted his Response to Order to Show Cause on October 15, 2017 and a Reply on November 6, 2017, respectively. In doing so, Mr. Finney challenged the Florida Supreme Court's show cause process, arguing among other things, that his right to due process was being truncated by the Court's unorthodox procedure limiting his statutory right to appeal pursuant to Fla. R. App. P. 9.140(b)(1)(D). Mr. Finney further argued that the *Ring*-based retroactivity cutoff was violative of the Eighth and Fourteenth Amendments and that denying relief to pre-*Ring* defendants such as himself, but granting it to other post-*Ring* defendants, violated the prohibition against the arbitrary and capricious imposition of the death penalty as well as equal protection.

Thereafter, on January 26, 2018 the Florida Supreme Court denied Mr. Finney's appeal. *Finney v. State*, 235 So. 3d 279 (Fla. 2018). The Florida Supreme Court's denial was a generalized stock opinion, nearly identical to numerous other pre-*Ring* defendants who had filed similar claims for relief, denying relief based upon the court's prior decision in *Hitchcock*. The opinion failed to provide any discussion

or analysis of Mr. Finney's arguments or the constitutionality of its partial retroactive application of the *Hurst* decisions. The mandate issued on February 13, 2018.

Following issuance of the mandate by the Florida Supreme Court, Mr. Finney filed a Petition For Writ of Certiorari to this Court on June 25, 2018. On October 1, 2018 this Court denied Mr. Finney's Petition. *Finney v. Florida*, 139 S. Ct. 197 (2018).

During the interim of the resolution of his litigation related to the *Hitchcock* show cause process, on March 12, 2018 Mr. Finney filed an additional successive motion for postconviction relief in the circuit court. Mr. Finney's successive motion raised one claim, arguing that his death sentence violated due process where he had not been convicted of all the elements necessary to sentence someone to death pursuant to Fla. Stat. § 921.141. The circuit court denied Mr. Finney's motion on July 31, 2018 and he timely appealed to the Florida Supreme Court.

On appeal, the Florida Supreme Court once again issued a show cause order directing Mr. Finney to address why the trial court's order denying relief should not be affirmed in light of the Florida Supreme Court's decisions in *Finney v. State*, 235 So. 3d 279 (Fla. 2018) and *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert denied*, 138 S. Ct. 513 (2017). Mr. Finney responded to the show cause order, submitting briefing to the Florida Supreme Court on October 4, 2018 and October 29, 2018. On December 28, 2018 the Florida Supreme Court denied relief. *Finney v. State*, 260 So. 3d 231 (Fla. 2018). The mandate issued that same day.

Following issuance of the mandate, on March 14, 2019 Mr. Finney filed an Application for Sixty Day Extension Of Time In Which to File Petition For Writ Of

Certiorari To the Florida Supreme Court. Justice Thomas granted Mr. Finney's request for a sixty-day extension of time, providing up to and including May 27, 2019 for Mr. Finney to file his Petition for Writ of Certiorari. This Petition follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE THE ISSUE OF WHETHER DEFENDANTS WHO WERE SENTENCED TO DEATH UNDER FLA. STAT. § 921.141 WHERE THE JURY DID NOT RETURN UNANIMOUS FINDINGS OF FACT ON ALL THE NECESSARY ELEMENTS TO RETURN A SENTENCE OF DEATH VIOLATES THE DUE PROCESS CLAUSE AND EIGHTH AMENDMENT AND WHETHER THE DENIAL OF RELIEF TO SOME DEFENDANTS WHILE GRANTING RELIEF TO OTHERS FOR CRIMES COMMITTED PRIOR TO THE DECISION IN *RING V. ARIZONA* VIOLATES EQUAL PROTECTION AND THE *EX POST FACTO* CLAUSE OF THE FLORIDA CONSTITUTION

This Court's decision in *Hurst v. Florida* resulted in a seismic shift in Florida law. Following the decision in *Hurst v. Florida*, the Florida Supreme Court attempted to analyze its impact on Florida's capital sentencing scheme and what would be required, moving forward, to ensure that Florida's system complied with clearly established federal law. In doing so, the Florida Supreme Court noted that this Court had explicitly receded from both *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989), two of this Court's prior decisions upholding Florida's capital sentencing scheme. *Hurst v. State*, 202 So. 3d at 44. The Florida Supreme Court further recognized that the foundation of its jurisprudence had been invalidated:

> The Supreme Court's ruling in *Hurst v. Florida* also abrogated this Courts decisions in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975), *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *Blackwelder v. State*, 851 So. 2d 650 (Fla. 2003), and

> *State v. Steele*, 921 So. 2d 538 (Fla. 2005), precedent upon which this Court has also relied in the past to uphold Florida's capital sentencing scheme.

Id. at 44. The Florida Supreme Court interpreted Florida's capital sentencing scheme and adopted a new construction of what was required. It held that the facts appearing in § 921.141 which had previously been required to be found by a judge in order to impose death were in fact elements of a higher degree of murder required to be found unanimously and beyond a reasonable doubt by a jury. *Hurst v. State*, 202 So. 3d at 53. Thereafter, in *Asay v. State*, 210 So. 3d 1, 15-16 (Fla. 2016) the Florida Supreme Court acknowledged it had not previously recognized these facts as elements (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.").

Prior to *Hurst v. State*, the Florida Supreme Court had repeatedly regarded the existence of one aggravating factor as all that was necessary to authorize the imposition of death. In its decision in *Hurst v. State*, however, the Florida Supreme Court acknowledged that additional fact-finding by the jury of the additional elements required under § 921.141 was necessary in order to render a valid death sentence. That sentiment was further acknowledged by the Florida Supreme court in *Perry v. State*, 210 So 3d 630, 633 (Fla. 2016). ("[T]he findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury."). Just as in *Hurst v. State*, the Florida

Supreme Court in *Perry* noted that Florida law had long required the jury to be unanimous in the finding of elements of a criminal offense to have been proven by the State beyond a reasonable doubt. Because of that longstanding acknowledgement, the Florida Supreme Court then struck down the provision in Chapter 2016-13 permitting a less-than-unanimous jury to return a sentence of death. *Id.* at 640-41.

It was on the heels of the Florida Supreme Court's decisions in *Hurst v. State* and *Perry v. State* that the Florida Legislature enacted Chapter 2017-1 on March 13, 2017. The revision to Florida Statutes § 921.141, through enactment of Chapter 2017-1, codified the Florida Supreme Court's holding in *Hurst v. State* and confirmed the requirement that a defendant would not be eligible for a death sentence unless the State carried its burden of establishing each element of capital first degree murder beyond a reasonable doubt and each of those elements was found unanimously by a jury. Under the revised § 921.141, the statutory maximum sentence that can be imposed on a first degree murder conviction is one of life imprisonment. For a death sentence to be permissible, the defendant must be convicted of the higher degree of murder, i.e. capital first degree murder. The revised § 921.141, provides for proof of the **elements** necessary to raise a conviction of first degree murder up to capital first degree murder to be presented at a "penalty phase" proceeding. But, a unanimous jury's finding that the State has proven the necessary elements beyond a reasonable doubt is functionally **a verdict finding the defendant guilty of the greater offense of capital first degree murder**.[8]

[8] Following the decisions in *Hurst v. State* and *Perry v. State*, and the

The Florida Supreme Court's identification and interpretation of Fla. Stat. § 921.141 in *Hurst v. State* had implications for purposes of due process and the Eighth Amendment. The identification of facts or elements necessary to increase the authorized punishment is a matter of substantive law, and substantive law governs from the date of enactment of the statute. As this Court held in *Alleyne v. United States*, 133 S. Ct 2151, 2160 (2013), "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." This Court further noted that "[d]efining 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." *Id.* at 2161.Court decisions identifying the elements of a statutorily defined criminal offense constitute

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subsequent enactment of Chapter 2017-1, the Florida Supreme Court reiterated its statutory interpretation of § 921.141 in several other cases. In *Kirkman v. State*, the court held:

> "Before a 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.** *Hurst*, 202 So. 3d at 57."

233 So. 3d 456, 471-72 (Fla. 2018) (emphasis added). The decision in *Kirkman* was also in accord with the court's decision in *Williams v. State,* where it once again stated that "any fact that increases the statutory maximum sentence is an 'element' of the offense to be found by a jury." 242 So. 3d 280, 286 (Fla. 2018). These cases all reinforce that the Florida Supreme Court has consistently interpreted that the factual determinations required to elevate a conviction for first degree murder to eligibility for a sentence of death pursuant to § 921.141, i.e. capital first degree murder, are indeed 'elements' for purposes of due process.

substantive law that dates back to the date of enactment. *Bousely 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)."). "A judicial construction of a statute is an authoritative statement of what the statue 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).

In *Richardson v. United States*, 526 U.S. 813, 817 (1999) this Court further held:

> Calling a particular kind of fact an "element" carries certain legal consequences. *Almendarez–Torres v. United States,* 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. *Johnson v. Louisiana,* 406 U.S. 356, 369–371, 92 S. Ct. 1620, 32 L.Ed.2d 152 (1972)) (Powell, J., concurring); *Andres v. United States,* 333 U.S. 740, 748, 68 S. Ct. 880, 92 L. Ed. 1055 (1948); Fed. Rule Crim. Proc. 31(a).

Therefore, when a statute uses the words elements to distinguish between a lower and higher degree of an offense, due process requires the elements necessary for the

higher degree of the offense to be proven by the State beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) ("The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty."). Thus, while the construction of § 921.141 is a matter of state law, how and to whom a state's substantive criminal law defining a criminal offense is applied must comport with due process.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). *See also Patterson v. New York*, 432 U.S. 197, 215 (1977) ("a State must prove every ingredient of an offense beyond a reasonable doubt, and [ ] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). Due process of law and the right to an impartial jury entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). In *Fiore v. White*, this Court addressed the import of the Due Process Clause in the context of the 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.

531 U.S. 225, 226 (2001). This Court inquired of the Pennsylvania Supreme Court as to the basis for one of the determinations regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted. This Court's focus was upon whether the decision by the Pennsylvania Supreme Court construing the criminal statute was a straightforward reading of the statute or a new interpretation. *Id.* at 226. In response to this Court, the Pennsylvania Supreme Court replied that its ruling was a clarification of the plain language of the statute. *Id.* at 228. Based upon that response, this Court then held that the Due Process Clause had been violated. *Id.* at 228-29. Because Fiore had not been found guilty of one of the essential elements of the criminal offense, his conviction was constitutionally invalid.

Just as the Pennsylvania Supreme Court had done in *Fiore*, the Florida Supreme Court in *Hurst v. State* read the plain language of Florida's capital sentencing scheme and determined the statutorily required facts necessary to convict a defendant of capital first degree murder. And just as in *Fiore*, *Hurst v. State* did not create a new rule; it merely identified the substantive law set forth in the previously enacted version of § 921.141. Under Florida law as pronounced by the Florida Supreme Court in *Hurst v. State*, and subsequently codified by Chapter 2017-1, to be convicted of capital first degree murder, the jury must find the additional elements under § 921.141 ***in addition to the elements of first degree murder***. *Hurst*, 202 So. 3d at 53-54. (emphasis added). A conviction of capital first degree murder without a unanimous jury's finding that the State proved those additional elements beyond a reasonable doubt, violates the Due Process Clause. *Apprendi v. New Jersey*,

530 U.S. 466, 476-77 (2000) (due process of law and the right to an impartial jury indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Without a constitutional conviction of all the elements necessary to render a verdict of death pursuant to § 921.141, any death sentence imposed is unconstitutional because it is in excess of the statutory maximum for a conviction of first degree murder.

In denying relief, the Florida Supreme Court refused to acknowledge that Mr. Finney's claim was not one based on retroactivity but rather due process and the interpretation/clarification of Florida's substantive criminal law. Rather than address this facet of Mr. Finney's claim, the Florida Supreme Court simply relied upon its previous decisions finding *Hurst v. Florida* did not apply retroactively to death sentences final before June 24, 2002. The Florida Supreme Court's decision focused instead on its retroactivity analysis in *Hitchcock v. State,* 226 So. 3d 216 (Fla. 2017), and by implication *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and the Sixth Amendment, while ignoring the substance of Mr. Finney's claim. Mr. Finney's argument, however, was not about whether either *Hurst v. Florida* or *Hurst v. State* should be retroactively applied to him; he merely cited to *Hurst v. State* to reference the Florida Supreme Court's pronouncement that the 'elements' under § 921.141 arise from the statute and have been present since its enactment.

Florida's substantive law identifies the elements that separate first degree murder from the additional elements necessary to sentence someone to death under

§ 921.141. Those elements must be found in addition to the elements of first degree murder. Any conviction of capital murder without a unanimous jury's finding that the State proved those additional elements beyond a reasonable doubt violates the Due Process Clause. *See In re Winship*, 397 U.S. 358 (1970). Regardless of however it may be labeled in the statute, the jury's verdict is functionally a determination of the defendant's guilt of that higher criminal offense. *See Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("[A]ll facts essential to imposition of the level of punishment that the defendant received—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury beyond a reasonable doubt.").

That the elements required to sentence someone to death identified by the Florida Supreme Court in *Hurst v. State* have been in existence since the enactment of § 921.141 is further supported by the prohibition against *ex post facto* laws. Article I, § 10 of the U.S Constitution provides: "No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts . . . ." Under the *Ex Post Facto* Clause, the substantive criminal law setting forth the elements of capital first degree murder must have been in existence on the day the crime occurred. Applying a criminal law enacted after a crime was committed that changes the elements or increases the punishment for that crime is expressly prohibited. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977) (extending the protections of the *Ex Post Facto* Clause to the judiciary). That means that the substantive criminal law identifying the elements necessary to convict a defendant of first degree murder and

sentence them to death must have been in place at the time of Mr. Finney's crime in 1991. If the revised § 921.141 established new elements that did not exist on the date of the homicide, the use of those elements to convict a defendant of the higher degree of murder, i.e. capital first degree murder, to enhance the punishment to a sentence of death would be prohibited. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964). In such a scenario, every capital defendant, including Mr. Finney, who has been convicted of a homicide committed before the enactment of Chapter 2017-1 or the decision in *Hurst v. State* could not be convicted of capital first degree murder.

The Florida Supreme Court's opinion in *Victorino v. State*, 241 So. 3d 48 (Fla. 2018) further supports the argument that the substantive elements identified in *Hurst v. State* and confirmed by Chapter 2017-1 have been present since the enactment of the statute in 1972. In *Victorino*, the Florida Supreme Court explained that the statute "**neither alters the definition of criminal conduct nor increases the penalty**" for capital first degree murder and therefore is not an *ex post facto* law. *Id.* at 50. In finding no *ex post facto* violation, the Florida Supreme Court confirmed that the elements of capital first degree murder have been present since the statute was enacted. And additionally, as noted *supra*, the revised § 921.141 has been applied by the Florida Supreme Court and the State as controlling for crimes which occurred prior to its enactment on March 13, 2017. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017) (crime occurred in 1981); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (crime occurred January 1981). In denying Mr. Finney the benefit of its interpretation of § 921.141 in *Hurst v. State,* while providing it to other similarly situated death sentenced inmates,

the Florida Supreme Court has violated his right to Equal Protection of the law. *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942). And as this Court has made clear, "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and…[subjects] one and not the other" to a uniquely harsh form of punishment, *Id.* at 541, such capricious application of a penalty as severe as death violates the Eighth Amendment.

This Court noted in *Jones v. United States*, 526 U.S. 227, 232 (1999) that "[m]uch 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." The facts required under § 921.141 have been statutorily defined as necessary for the imposition of a death sentence since its enactment in 1973. For Mr. Finney to have been convicted of first degree murder and sentenced to death, a jury was required to return a verdict finding all of the requisite elements unanimously and beyond a reasonable doubt. Because we know that did not occur in Mr. Finney's case, his sentence of death violates the Due Process Clause and the Eighth Amendment.

CONCLUSION

Due process contemplates substance over form. This Court's language in *Hurst v. Florida* makes clear that the facts which expose a defendant in Florida to the greater punishment of a sentence of death, i.e. the unanimous findings by the jury at penalty phase as to the existence of aggravating factors, the sufficiency of the aggravators, and that the aggravators outweigh the mitigation, are elements for

purposes of due process. *Hurst*, 136 S. Ct. at 621. Due process required that Mr. Finney's jury return findings of fact, unanimously and beyond a reasonable doubt, as to each element necessary for the imposition of death under § 921.141 *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt). Those were the factual findings required under § 921.141 at the time of Mr. Finney's crime, and because that did not occur, his death sentence is not constitutionally valid.

As such, for the above stated reasons, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to review the Florida Supreme Court decision.

Respectfully submitted,

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