DOCKET NO. 18-9464

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CHARLES FINNEY,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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

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REPLY BRIEF OF PETITIONER

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REPLY

Contrary to Respondent's contention, the Florida Supreme Court's decision is not based on adequate and independent state law grounds precluding this Court's review. Petitioner's claim for relief properly presents this Court with a debatable or important unsettled question of constitutional law necessitating review. The Florida Supreme Court's rejection of Petitioner's 'capital first degree murder' argument, as Respondent labels it, did not constitute a ruling based on state law alone. BIO at 9. The Florida Supreme Court denied relief on both procedural grounds and on the basis of a merits determination that no crime of 'capital first degree murder' existed under Florida law. Neither of which precludes this Court's exercise of jurisdiction over the issue Petitioner now presents.

The Florida Supreme Court's finding as to procedural bar cannot serve as a basis to preclude Petitioner's claim from this Court's review. Well established federal law is clear that for any state procedural bar to constitute adequate and independent state grounds, "the last state court rendering judgment must clearly and expressly state that it is relying on a state procedural rule to resolve the federal claim, must not decide the claim on the merits, and must base its decision entirely on an "adequate" state procedural rule. *Lynd v. Terry*, 470 F.3d 1308, 1314 (11th Cir. 2006), (citing *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir.2001). In denying relief the Florida Supreme Court held:

> After reviewing Finney's response to the order to show cause, as well as the State's arguments in reply, we conclude that our prior denial of Finney'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 Finney*, 235 So. 3d at 279-80; *Hitchcock*, 226 So. 3d at 217; *see also Foster v. State*, No. SC18-860, 2018 WL 6379348, at 2-4 (Fla. Dec. 6, 2018) (explaining why the "elements of 'capital first-degree murder' " argument derived from *Hurst* and the legislation implementing *Hurst* "has no merit.").

Finney v. State, 260 So. 3d 231 (Fla. 2018). That analysis is clear that the Florida Supreme Court resolved Petitioner's claim both on procedural grounds and —by citing to its decision in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018)—on the merits. Thus, the court's analysis did not 'clearly and expressly' state that its judgement rested solely on state procedural rules. *Lynd*, 470 F.3d at 1314. What is more, the court's finding of procedural bar ignored the constitutional basis underlying Petitioner's claim for relief and mischaracterized it as being substantively the same as Petitioner's prior claim regarding the retroactivity the *Hurst* decisions. In doing so, the court's analysis suffered from the same defect which Respondent now attempts to advance: the mischaracterization that the claims previously raised by Petitioner pursuant to the *Hurst* decisions are one in the same as those he is now advancing pursuant to Chapter 2017-1 and the revised § 921.141. However, as Petitioner has attempted to explain throughout litigation of his current claim for relief, they are not. The arguments now raised by Petitioner are not about the retroactivity of the *Hurst* decisions; nor are they about the constitutionality of the Florida Supreme Court's partial retroactivity approach employed in the wake of the *Hurst* decisions. BIO at 10. The federal question that has been presented by Petitioner in this case is whether his sentence of death violates the Due Process Clause and the Eighth Amendment where he was not convicted of all the requisite elements of capital first degree murder,

unanimously and beyond a reasonable doubt. That claim is far different than one based on the issue of the retroactive application of the *Hurst* decisions to his sentence of death. To the extent the Florida Supreme Court relied on that determination to find Petitioner's claim procedurally barred, that finding was in error and cannot serve as basis for independent and adequate state grounds precluding review by this Court.

Equally without merit is Respondent's argument that Petitioner's claim is immune from this Court's review where the Florida Supreme Court's merits determination rested on independent and adequate state law grounds. BIO at 9. Contrary to Respondent's contention, Petitioner does not concede such a point by arguing that his claim for relief stems from the Florida Supreme Court's "interpretation/clarification of Florida's substantive criminal law" in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). BIO at 9. Respondent's argument here is simply yet another attempt at mischaracterizing Petitioner's claim for relief and a clumsy attempt to reframe the issue. The crux of Petitioner's claim is not based on his own interpretation of Florida law in light of the decision in *Hurst v. State*, BIO at 9. Rather, it is in direct response to the interpretation provided by the Florida Supreme Court itself. In *Hurst v. State*, the Florida Supreme Court's interpretation of what it determined was required under Fla. Stat. §921.141 was clear:

> [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 analysis, identifying that just as elements of a crime must be found unanimously by a Florida jury, all the "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*, 202 So. 3d at 53-54 (emphasis added), constituted a plain reading of Fla. Stat. § 921.141 that implicated the Due Process Clause. *See Fiore v. White*, 531 U.S. 225, 228-29 (2001). The court's analysis constituted an interpretation of Fla. Stat. § 921.141, identifying the elements necessary to sentence someone to death, and was by nature substantive law. *See Bousley v. State*, 523 U.S. 614, 625 (1998). Its use of the words "elements" with respect to particular facts carried with it due process implications. *See Richardson v. United States*, 526 U.S. 813, 817 (1999). The Florida Supreme Court's use of the word "elements" to distinguish between what was required to be convicted of first degree murder and what additional findings of fact were required to render a defendant eligible for a sentence of death, carried with it the requirement under due process to be proven by the State beyond a reasonable doubt. *See Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). That meant a conviction of capital murder and sentence of death without a unanimous jury's

findings that the State proved those additional elements beyond a reasonable doubt violates the Due Process Clause. *See In re Winship*, 397 U.S. 358, 364 (1970). Regardless of the fact the analysis dealt with interpretation/construction of a Florida criminal statute, the court's analysis nonetheless carried with it implications for purposes of federal law.

Turning to the Florida Supreme Court's merits determination, the court's decision was not separate from Petitioner's federal claim under the Due Process Clause and the Eighth Amendment. While this Court will not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgement," *Coleman v. Thompson*, 501 U.S. 722 (1991), it does not provide immunity to all state court rulings that claim to have based their decisions on state law. State court rulings are only "independent" and unreviewable where the state law basis for denial of a federal constitutional claim is separate from the merits of the federal claim. *See Foster v. Chatman*, 136 S. Ct. 1737, 1759 (2016); *see also Michigan v. Long*, 463, U.S. 1032, 1037-44 (1983). Here, while the Florida Supreme Court's merits analysis relied on *Foster v. State*, 258 So. 3d 1248, 1251-52 (Fla. 2018)—which was based in turn upon the court's interpretation of state law pursuant to Fla. Stats. § 782.04, § 775.082, and § 921.141 (and the manner which they have been defined by the Florida Legislature)—it was still influenced by this Court's interpretation of federal law and cannot be separated from the federal claim raised by Petitioner. *Chatman,* 136 S. Ct. at 1737, ("When "a state court's interpretation of state law has

been influenced by an accompanying interpretation of federal law," the proper course is for this Court to "revie[w] the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." (additional citations omitted)). No matter how the Florida Supreme Court chose to articulate its analysis of the issue in either Petitioner's case, or Mr. Foster's, it was predicated on federal law where it sought to determine what statutorily defined facts in Florida were required to elevate a conviction of first degree murder to one eligible for a sentence of death, thus requiring it to be submitted to a jury and proven beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466 (2002); *Ring v. Arizona*, 536 U.S. 584 (2004); *Alleyne v. United State*s, 570 U.S. 99 (2013). Such a determination, whether explicitly or implicitly, invoked both the Due Process Clause and the Eighth Amendment.

Respondent contends, however, that none of this matters where this Court's opinion in *Hurst v. Florida,* 136 S. Ct. 616 (2016) did not address the process of weighing the aggravating and mitigating circumstances or suggest the jury must conduct that process under the Sixth Amendment. BIO at 11. Petitioner became eligible for a sentence of death, Respondent contends, by virtue of his conviction of a prior violent felony. BIO a 11. The gist of Respondent's argument here is essentially that all that is required under Florida's capital sentencing scheme to satisfy the

requirements of the Sixth Amendment and *Hurst v. Florida* is the finding of one aggravating circumstance. That argument, however, is easily disposed of as this Court's opinion in *Hurst v. Florida* did not merely address the Sixth Amendment and the right to jury findings regarding aggravating circumstances.

This Court's opinion in *Hurst v. Florida* determined Florida's capital sentencing scheme required jury factfinding beyond the existence of one mere aggravator. In doing so this Court concluded that ""[w]e hold this sentencing scheme unconstitutional," because "[t]he Sixth Amendment requires a jury, not a judge, ***to find each fact necessary to impose a sentence of death.***" *Id.* at 619. (emphasis added). The Court identified those critical factfindings, leaving no doubt as to how the statute must be read under the Sixth Amendment: "the Florida sentencing statute does not make a defendant eligible for death ***until findings . . . [of] sufficient aggravating circumstances . . . and . . . insufficient mitigating circumstances to outweigh the aggravating circumstances.***" *Id.* at 622. (citing Florida Statutes § 921.141(3)) (quotations omitted). *Hurst* identified these findings as the operable findings that must be made by a jury. *Hurst* resolved that "[a] jury's mere recommendation is not enough." *Id.* at 619. This Court's language in *Hurst v. Florida* thus made clear that under Florida's capital sentencing scheme the finding as to the existence of one aggravating factor or a conviction for a prior violent felony are not all that is required under Fla. Stat. § 921.141 to elevate a conviction of first degree murder to one punishable by death. Moreover, as cited above, the Florida Supreme Court's pronouncement in *Hurst v. State*, 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**, *Hurst,* 202 So. 3d at 57-58 (emphasis added), further establishes this requirement. The result is that Petitioner's sentence of death, imposed in the absence of those additional findings, constitutes federal constitutional error.

Petitioner's argument is not based upon a mischaracterization that the additional findings required by *Hurst v. State* are 'elements' of capital first degree murder. BIO at 13. It is based upon the Florida Supreme Court's own repeated identification of those additional findings under § 921.141 as such. *See Hurst v. State*, 202 So. 3d at 57-58; *see also Perry v. State*, 210 So. 3d 630 (Fla. 2016); *Kirkman v. State*, 233 So. 3d 456, 471-72 (Fla. 2018); *Victorino v. State,* 241 So. 3d 48, 49 (Fla. 2018). And while Respondent cites to the Florida Supreme Court's recent decision in *Foster v. State,* 258 So. 3d at 1251-53 where the court rejected the argument that its identification in *Hurst v. State* of the additional fact findings under § 921.141 constituted elements for purposes of due process and the Eighth Amendment, that decision is not dispositive. BIO at 12. The Florida Supreme Court's determination in *Foster* that the "*Hurst*-phase" findings are not elements of the capital felony of first degree murder was not only inconsistent with its prior findings in *Hurst v. State*, but also with jurisprudence from this Court. The court's opinion engaged in an exercise

in semantics in which it focused on the parsing out of the statutory language in Fla. Stat. § 782.04 and § 921.141, and the definition of first degree murder as a capital crime, rather than on how the additional findings under § 921.141 function in order to elevate a conviction for first degree to one punishable by death. It ignored that a conviction of guilt under Florida's murder statute, Fla. Stat. § 782.04, does not render due process inapplicable to the additional procedures required under Fla. Stat. § 921.141 in order to render a sentence of death. *See Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). It ignored that the additional requirements under § 921.141, and recognized by the Florida Supreme Court in *Hurst v. State*, however they may be labeled, function to elevate a conviction for first degree murder under § 782.04 a capital crime, to one which a penalty of death is a sentencing option.

Any determination that due process does not attach to such factual findings ignores the plainly obvious fact as to how those jury determinations functionally operate and stands in direct conflict with this Court's jurisprudence. *See Ring v. Arizona*, 536 U.S. 584, 610 (2002).(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 be found by a jury beyond a reasonable doubt). Holding that due process is not violated in circumstances where the jury was not required to then return unanimous findings as to the factual determinations necessary to increase the punishment available following a conviction under section 782.04, renders the guarantee of due process a

nullity. *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged."). As this Court has noted, "*Winship* is concerned with substance rather than...formalism" and requires an analysis that looks at the operation and effect of the law as applied and enforced by the state. *Mullaney*, 421 U.S. at 699.

Last, Respondent argues that Due Process and the Eighth Amendment are not implicated because mitigating circumstances and weighing do not meet any part of the definition of elements. BIO at 14. Citing to *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016), Respondent contends this Court has already previously determined that mitigating and weighing are not fact determinations, therefore Petitioner's claim is without merit. BIO at 14. However, Petitioner has never advanced the argument that the finding of mitigating circumstances are fact determinations which constitute elements under Fla. Stat. § 921.141. Rather, it is the findings laid out by the Florida Supreme Court in *Hurst v. State* as to ***the existence of aggravators, the sufficiency of aggravators, and that the aggravators outweigh the mitigation*** which the court identified as elements required to be found by the jury under Florida's capital sentencing scheme in order to sentence someone to death. *Hurst*, 202 So. 3d at 57-58. Findings which were not directly at issue in *Kansas v. Carr* where this Court's decision was reviewing Kansas's death penalty scheme, not Florida's. Contrary to Respondent's contention, this Court's opinion in *Carr* did not—and could not—hold that regardless of the statue being analyzed, a determination regarding the relative

weight of aggravating and mitigating factors, as well as the sufficiency of aggravators, could never be elements that must be found by a unanimous jury beyond a reasonable doubt. That is because while the Eighth Amendment doesn't mandate specific findings as to sufficiency of aggravators or relative weight that must be included in a death penalty statute, the Florida legislature chose to include them and the Florida Supreme Court interpreted Fla. Stat. § 921.141 as requiring them before death can be imposed. Therefore, they are factual findings that must be made by the jury beyond a reasonable doubt. *Hurst v. Florida*, 136 S. Ct. at 622.

Respectfully submitted,

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