DOCKET NO. 20-6043

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ROBIN LEE ARCHER,

***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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*Martin J. McClain
Fla. Bar No. 0754773
141 NE 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@comcast.net

Counsel for Petitioner

***COUNSEL OF RECORD**

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Petitioner, **ROBIN LEE ARCHER**, 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 AND RESPONDENT'S ASSERTED REASONS FOR DENYING THE WRIT

1. The issues raised in Mr. Archer's Petition are not procedurally barred

As its first reason for denying Mr. Archer's petition, Respondent asserts that the Florida Supreme Court denied Mr. Archer's appeal on the basis of an independent and adequate procedural bar. Specifically, Respondent states:

> The Florida Supreme Court found that the first claim was procedurally barred. As the court explained, the constitutional claim was "procedurally barred" because the court had "denied this same claim when [Petitioner] raised it in a petition for a writ of habeas corpus."

(Brief in Opposition at 8)(hereinafter "BIO at ___".).

Indeed, the Florida Supreme Court did hold that the circuit court had properly found the first claim raised by Mr. Archer in his rule 3.851 motion was procedurally barred due to the ruling in *Archer v. Jones*, 2017 WL 1034409 (Fla. 2017), rehearing denied 2018 WL 500330 (Fla. 2018). But, the Questions Presented that appear in Mr. Archer's Petition do not concern the first claim that appeared in the amended 3.851 motion. Instead, the questions Mr. Archer presents in his Petition arise from the second claim in his amended 3.851 motion which was denied by the state courts on the merits.

Following this Court's decision in *Hurst v. Florida*, 135 S.Ct. 616 (2016), Mr. Archer filed both a petition for writ of habeas corpus in the Florida Supreme Court and a rule 3.851 motion in the circuit court arguing that under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), he was entitled to the retroactive benefit of the decision in *Hurst v. Florida*.1

The habeas petition was denied by the Florida Supreme Court on March 17, 2017. However, Mr. Archer's motion for rehearing was not denied by the Florida Supreme Court until January 22, 2018.

While the habeas proceedings were pending, the circuit court

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[1]He filed both a habeas petition in the Florida Supreme Court and a rule 3.851 motion in circuit court because of uncertainty as to which procedural vehicle would be prove to be the more effective way to present his claim that *Hurst v. Florida* should be applied retroactively under Florida law as set forth in *Witt v. State*.

held the rule 3.851 motion in abeyance. After the denial of the habeas petition became final, the circuit court allowed Mr. Archer to amend his 3.851 motion. The amended motion added a second claim to the 3.851 motion. This second claim was Mr. Archer's claim that his death sentence violated the Due Process Clause and the Eighth Amendment in light of construction of the plain language of Fla. Stat. § 921.141 which the Florida Supreme Court announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The statutory construction appearing in *Hurst v. State* was that the facts that the statute required a judge to make in writing before she was authorized to impose a death sentence were essentially elements of the offense which a jury had to unanimously find proven by the State beyond a reasonable doubt. *Id*. at 57 ("these findings occupy a position on par with elements of a greater offense").

When the circuit court addressed Mr. Archer's amended rule 3.851 motion, it noted that Mr. Archer had conceded that the claim that *Hurst v. Florida* was retroactive had been rejected in *Archer v. Jones*. The circuit court referred to this as the first claim and ruled it was procedurally barred. (ROA 628-29).

However, the circuit court denied the second claim on the merits. This was the Due Process Clause and Eighth Amendment claim raised in the amendment to the rule 3.851 motion that the circuit court allowed. Accordingly, the circuit court did not find Mr. Archer's second claim to be procedurally barred. Specifically, the circuit court denied that the second claim

saying it "lacks merit and shall be denied." (ROA 629). The circuit court elaborated: "Defendant's contention that the Due Process Clause is violated because the State did not have to prove the 'elements' of 'capital murder' beyond a reasonable doubt is also without merit." (ROA 629-30).

When the Florida Supreme Court addressed the circuit court's ruling as to the second claim, it denied the claim on the merits. *Archer v. State*, 293 So. 3d 455, 457 (2020)("it is without merit, as we explained in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019).").

In the BIO, Respondent first notes that when addressing the second claim of the amended 3.851 motion, the Florida Supreme Court said: "Even if this claim is not procedurally barred, it is without merit, as we explained in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019)." (BIO at 9). Respondent does not argue that the second claim was denied on the basis of a procedural bar. Instead, Respondent argues that the Florida Supreme Court denied the merits of the second claim on the basis of Florida state law:

> The court below rejected Petitioner's theory on state-law grounds, citing a state court case—*Rogers*, Pet. App. 5—which itself relied on state-law authorities to reject the argument that *Hurst II* created new substantive elements that needed to be proved beyond a reasonable doubt.

(BIO at 10). While the Florida Supreme Court did deny the second claim on the merits and cited a prior ruling of the Florida Supreme Court, Mr. Archer's claim rested upon the Due Process

Clause and the Eighth Amendment. It specifically relied upon this Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Ring v. Arizona*, 536 U.S. 584 (2002); *Fiore v. White*, 531 U.S. 225 (2001); *Bunkley v. Florida*, 538 U.S. 835 (2003); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), among others. Mr. Archer argued that the statutorily identified facts which must be found to exist in order to increase the range of permissible punishment to include a death sentence were not found by a unanimous jury beyond a reasonable doubt.

In *Hurst v. State*, the Florida Supreme Court read the plain language of the capital sentencing statute and held:

> 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.

Hurst v. State, 202 So. 3d at 53-54. According to this Court's decision in *Ring v. Arizona*, those additional findings of fact as a matter of federal constitutional law constitute elements of the greater offense. *See Ring v. Arizona*, 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 be found by the jury beyond a reasonable doubt."); *see also 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.)" While the identification of the facts which must be shown to authorize a more severe sentence than is otherwise authorized is a matter of a state substantive law, whether facts are identified as necessary to authorize a more severe sentence are elements of a greater offense is determinative of a criminal defendants right to a jury trial under the Sixth Amendment and right to have the State prove the elements beyond a reasonable doubt under the Due Process Clause. Indeed, the failure to require the State prove a fact that the state courts determined was necessary to authorize a defendant's incarceration rendered the conviction returned and sentence imposed without proof of the required fact invalid. *Fiore v. White*, 531 U.S. at 228-29 ("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.").

Focusing on the Florida Supreme Court citation to its earlier decision in *Rogers v. State* to conclude that Mr. Archer's second claim lacks merit, Respondent claims that the citation to a state court decision meant that the denial of Mr. Archer's

federal constitutional claim was a state law decision over which this Court lacks jurisdiction. However, the issue raised in the direct appeal in *Rogers v. State* was stated by the Florida Supreme Court as follows:

> Rogers first argues that the trial court erred in failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances.

Rogers v. State, 285 So. 3d at 885. The trial in *Rogers* began in July 31, 2017, which was after Florida's capital sentencing statute had been revised in the wake of *Hurst v. Florida*.2 The amended version of the statute was examined in by the Florida Supreme Court in *Perry v. State*, 210 So. 3d 630, 638 (Fla. 2016):

> The amendments to section 921.141 clearly require the jury to explicitly find at least one aggravating factor unanimously. Additionally, they require unanimity as to each aggravating factor that may be considered by the jury and trial court in determining the appropriate sentence. **The changes also require the jury to consider whether there are sufficient aggravating factors to outweigh the mitigating circumstances in order to impose death. The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death.**

(Emphasis added). At issue in *Perry v. State* was whether the amended statute was constitutional. The Florida Supreme Court determined that permitting a death sentence without requiring the jury to make all the necessary factual determinations unanimously

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[2]Section 921.141 of the Florida Statutes was amended on March 7, 2016, to require the jury to make the factual findings that previously the judge was required to make in writing before she could impose a death sentence.

was unconstitutional. *Perry* explained:

> The statute is not explicit as to whether the requirement of a ten-to-two vote applies to the factual findings that there are sufficient aggravators and that the aggravating factors outweigh the mitigating circumstances or to the ultimate death recommendation. Compare § 921.141(2)(b), Fla. Stat. (2016), with § 921.141(2)(c), Fla. Stat. (2016). Consistent with our decision in *Hurst [v. State]*, we construe section 921.141(2)(b) 2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist. *Hurst [v. State]*, at 53–54. Clearly, if the intent was to apply a non-unanimous vote requirement to those separate factual findings, this would be unconstitutional as inconsistent with *Hurst [v. State]*, where we have held that those findings must be made unanimously. *See id.*

Perry v. State, 210 So. 3d at 639. Accordingly, the Florida Supreme Court concluded:

> to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.

Perry v. State, 210 So. 3d at 640.

Following the decision in *Perry v. State*, Florida's capital sentencing statute was again amended on March 13, 2017, in order to require the jury to return a unanimous death recommendation before a judge was permitted to consider imposing a death sentence.[3] The statute was otherwise unchanged from the version

[3]It is worth noting that the Florida Legislature in the amendment to the statute enacted on March 13, 2017, expressed no disagreement with the Florida Supreme Court's construction of the capital sentencing statute set forth in *Hurst v. State* or the construction of the amended version of the statute set forth in

at issue in *Perry v. State*.

Thus, at issue in the direct appeal in *Rogers v. State* were the statutorily identified findings set forth in the amended statute and discussed in *Perry v. State*. The appellant in *Rogers* argued that the Due Process Clause required that the State bore the burden of proving beyond a reasonable 1) the existence of the aggravating factors found by the jury, 2) that those aggravating factors found by the jury were sufficient to warrant a death sentence, and 3) that the aggravating factors found by the jury outweighed all of the mitigating factors that were present. In making this argument the appellant in *Rogers* not only relied upon *Perry v. State*, but also *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975); *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002).

The opinion in *Rogers v. State* did not disagree with the determination in both *Hurst v. State* and *Perry v. State* that for a death sentence to be authorized, the jury must: 1) identify the aggravating factors found to exist; 2) find that the aggravating factors found to exist are sufficient to warrant a death sentence; and 3) find that the aggravating factors outweigh all of the mitigating factors that are present. In *Rogers v. State*, the Florida Supreme Court merely held that in *Perry v. State* it had "mischaracterized *Hurst v. State*, which did not require that

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Perry v. State.

these determinations be made beyond a reasonable doubt." *Rogers v. State*, 285 So. 3d 886. Thus, the court in *Rogers v. State* concluded: "these [statutorily required] determinations are not subject to the beyond a reasonable doubt standard of proof, and the trial court did not err in instructing the jury."

In *Rogers v. State*, the Florida Supreme Court also cited its decision in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), a decision that issued in December of 2018, more than two years after *Hurst v. State* and twenty-one months after the Florida Legislature amended the capital sentencing statute to comport with *Hurst v. State* and *Perry v. State*. The Florida Legislature did not express any concern that those decisions had misconstrued the statutorily identified determinations of fact that were required before a death sentence became a permissible punishment. In *Foster v. State*, the Florida Supreme Court wrote:

> [T]he *Hurst [v. State]* 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 at 1252.

Neither *Rogers v. State* nor *Foster v. State* dispute what determinations a jury must make before a death sentence is a permissible sentence. Both decisions amount to a rejection of a contention that whether the determinations that a Florida jury must make before a death sentence is a permissible sentence are elements of a greater offense within the meaning of the Due

Process Clause. However whether the determinations that the jury must make before a death sentence is permissible are elements under the Due Process clause is a federal question. *See Alleyne v. United States*, 570 U.S. 99, 102 (2013)("[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."); *Apprendi v. New Jersey*, 530 U.S. at 494 ("Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

Before issuing *Rogers v. State* and *Foster v. State*, the Florida Supreme Court explicitly held in *Hurst v. State*:

> 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.

Hurst v. State, 202 So. 3d at 53-54.

While the decisions that the Florida Supreme Court relied on in denying Petitioner's appeal (which is the subject of Petition before this Court) recede from *Hurst v. State* and *Perry v. State*, they do not recede from what the statutorily identified findings are that must be made before a death sentence may be imposed.

Thus contrary to Respondent's contention, the state law is clear that 1) one or more aggravating factors must be found, 2) the aggravating factors found must be sufficient to warrant a death sentence, and 3) the aggravating factors found must outweigh all of the mitigating circumstances that are present. The rulings relied upon in *Archer v. State* concern the federal question of whether the requirement that the jury find the aggravating factors sufficient and that they outweigh all the mitigating factors are elements for purposes of Due Process Clause.

This Court has jurisdiction to hear and address the questions presented that Mr. Archer raised in his petition.

2. Florida's substantive law was altered by the statutory construction in *Hurst v. State* and was applied in cases in which the homicide at issue was committed in 1978.

Respondent maintains that *Hurst v. State* did not change Florida's substantive law. This assertion rests on a fundamental misunderstanding of what exactly substantive law is and the fact that the statutory construction set out in *Hurst v. State* was applied to some capital crimes committed as far back as 1978 while it was not applied in other capital cases committed as late as 1999.

At issue in Mr. Archer's petition is what is the criminal offense in Florida for which a death sentence is an authorized punishment. Under the holding in *Hurst v. State*, a death sentence cannot be imposed when a defendant is merely found guilty of first degree murder. Rather, for a death sentence to be authorized additional elements over and above first degree murder

must be found by a unanimous jury to have been proven by the State beyond a reasonable doubt.

Individuals convicted of first degree murders committed as far back as 1978 whose convictions were final long ago but whose death sentences did not become final until after June 24, 2002, had their death sentences vacated under *Hurst v. State*.4 In the case of William Melvin White, in 2017 the circuit court vacated his death sentence on the basis of *Hurst v. State*. The homicide was committed in 1978. White's conviction of first degree murder was final in 1982, but his death sentence did not become final until after June 24, 2002. *See White v. State*, 817 So. 2d 799 (Fla. 2002); *White v. State*, 729 So. 2d 909 (Fla. 1999); *White v. State*, 415 So. 2d 719 (1982). After White's death sentence was vacated, the State did not pursue another death sentence. As a result, a life sentence was imposed. White and others individuals will not receive a death sentence unless they are convicted of the greater offense, i.e. in addition to first degree murder a unanimous jury will have to find the statutorily identified additional elements necessary to authorize death as an available sentence. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017)(*Hurst* relief issued in case in which homicide was committed in June 1981, first degree murder conviction was final in 1984,

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[4]In *Fiore v. White*, federal habeas relief was ordered because the construction of the statute defining the criminal offense announced after Fiore's conviction was final included an element that was not found by his to have been proven beyond a reasonable doubt. The procedural posture there is akin to the procedural posture in Mr. Archer's case.

resentencing was ordered in 1996, and death sentence was not final until after June 24, 2002); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016)(*Hurst* relief issued in case in which three homicides were committed in January 1981, first degree murder convictions were final in 1993, resentencing was ordered in 2010, and death sentence was not final when *Hurst* issued).

Mr. Archer stands convicted of first degree murder for a 1991 homicide. The conviction was final in 1993 although a resentencing was ordered. Mr. Archer's death sentence became final in 1996. While the first degree murder convictions in *Card v. Jones* and *Johnson v. State*, were for murders committed 10 years before the one at issue in Mr. Archer's case and the first degree murder convictions were final before Mr. Archer's conviction became final, neither Mr. Card nor Mr. Johnson were validly sentenced to death on their convictions of first degree murder. Additional elements were held to be required. Meanwhile, Mr. Archer's death sentence on a first degree murder conviction remains intact under to the Florida Supreme Court's ruling at issue here. There is no principled distinction.

Indeed the Florida Supreme Court has haphazardly applied *Hurst v. State* in a retroactive fashion to some but not others. It has even sought to undo *Hurst v. State* and receded from its holding in some cases, but not in other cases. *See State v. Okafor*, 306 So. 3d 930 (Fla. 2020). The resulting confusion and chaos in Florida's substantive law screams out for certiorari review. In *Fiore v. White*, 531 U.S. at 226, the question

presented on which certiorari review was granted was "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." However, this Court ultimately did not decide the question presented in *Fiore* in light of the Pennsylvania Supreme Court's subsequent explanation of Pennsylvania's substantive law. In light of the seemingly ever changing substantive law in Florida which is being haphazardly applied, this Court should grant certiorari review here to address and decided the question on which review was granted in *Fiore*, but which was left unanswered when the decision in *Fiore v. White* issued.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review of the questions presented set out in his petition is warranted.

Respectfully submitted,

/s/. Martin J. McClain
MARTIN J. McCLAIN
Florida Bar No. 0754773

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 15, 2021.

/s/. Martin McClain
MARTIN J. MCCLAIN
Fla. Bar. No. 0754773
141 NE 30th Street
Wilton Manors, FL 33334

(305) 984-8344
martymcclain@comcast.net

Counsel for Petitioner