DOCKET NO. _____

OCTOBER TERM 2020

IN THE

SUPREME COURT OF THE UNITED STATES

LEROY POOLER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's statutory construction in *Hurst v. State* constitute substantive law and, if so, does the Due Process Clause of the Fourteenth Amendment require that this substantive law govern the law in existence in 1992, when Mr. Pooler's offenses were charged?
2. Whether the Florida Supreme Court's recession from *Hurst v. State* in *State v. Poole* violates the Eighth Amendment as it relates to the jury's role of finding statutorily required facts beyond a reasonable doubt in order to authorize a sentence of death?

PARTIES TO THE PROCEEDINGS

Petitioner Leroy Pooler was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent State of Florida was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:
Circuit in and for Palm Beach County, Florida,
State of Florida v. Leroy Pooler, No. 1995-CF001117AXXXMB
Judgment Entered: March 29, 1996

Direct Appeal:
Florida Supreme Court
Pooler v. State, 704 So.2d 1375 (Fla. 1997)
Judgment Entered: November 6, 1997

Supreme Court of the United States
Pooler v. Florida, 525 U.S. 848 (1998)

First Postconviction Proceeding:
Circuit in and for Palm Beach County, Florida,
State of Florida v. Leroy Pooler, No. 1995-CF001117AXXXMB
Judgment Entered: November 4, 2005

Florida Supreme Court
Pooler v. State, 980 So.2d 460 (Fla. 2008)
Judgment Entered: Jan. 31, 2008

Second Postconviction Proceeding:
Circuit in and for Palm Beach County, Florida,
State of Florida v. Leroy Pooler, No. 1995-CF001117AXXXMB
Judgment Entered: Oct. 12, 2018

Florida Supreme Court
Pooler v. State, 302 So.3d 744 (Fla. 2020)
Judgment Entered: July 2, 2020

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Notice of Related Cases iii

Table of Contents iv

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved..... 1

Statement of the Case and Procedural History 2

A. Trial and Postconviction Proceedings 2

B. The Florida Supreme Court's Opinion 3

Reasons for Granting the Writ 4

Conclusion 13

TABLE OF AUTHORITIES

Apprendi v. New Jersey, 530 U.S. 466 (2000)..... 9

Atkins v. Virginia, 536 U.S. 304 (2002)..... 3

Bailey v. United States, 516 U.S. 137 (1995)..... 7

Bouie v. City of Columbia, 378 U.S. 347 (1964)..... 9

Bousley v. United States, 523 U.S. 614 (1998)..... 7

Bunkley v. Florida, 538 U.S. 835 (2003)..... 8

Card v. Jones, 219 So.3d 47 (Fla. 2017)..... 10

Fiore v. White, 531 U.S. 225 (2001)..... 8

Fla. Dep't of Children and Families v. F.L., 880 So.2d 602 (Fla. 2004)... 8

Hall v. Florida, 134 S.Ct. 1986 (2015)..... 3

Horsley v. State, 160 So.3d 393 (Fla. 2015)..... 10

Hurst v. Florida, 136 S.Ct. 616 (2016)..... 3

Hurst v. State, 202 So.3d 40 (Fla. 2016)..... 3

Johnson v. Mississippi, 486 U.S. 578 (1988)..... 12

Pooler v. Crews, 134 S.Ct. 191 (2013)..... 3

Pooler v. Sec'y, Fla. Dep't. of Corr., 702 F.3d 1252 (11th Cir. 2012)..... 3

Pooler v. State, 704 So.2d 1375 (Fla. 1997)..... iii, 2

Pooler v. State, 980 So.2d 460 (Fla. 2008)..... iii, 2

Pooler v. State, 302 So.3d 744 (Fla. 2020)..... iii

Ring v. Arizona, 536 U.S. 584 (2002)..... 4

Rivers v. Roadway Exp., Inc., 511 U.S. 298 (1994)..... 7

Rogers v. Tennessee, 532 U.S. 451 (2001)..... 9

State v. Poole, 45 Fla. L. Weekly S41, 2020 WL 3116597 (Fla. 2020)..... 4

Teague v. Lane, 489 U.S. 288 (1989)..... 7

White v. State, 817 So.2d 799 (Fla. 2002) 10

White v. State, 729 So.2d 909 (Fla. 1999)..... 10

White v. State, 415 So.2d 719 (Fla. 1982)..... 10

Witt v. State, 387 So.2d 922 (Fla. 1980)..... 7

Zant v. Stephens, 462 U.S. 862 (1983)..... 12

PETITION FOR WRIT OF CERTIORARI

Petitioner Leroy Pooler respectfully petitions this Court for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion under review (App. A) is reported at 302 So.3d 744. The Order of the Florida Supreme Court denying rehearing is unreported (App. B). The order by the circuit court rejecting Mr. Pooler's postconviction motion is unreported (App. C).

STATEMENT OF JURISDICTION

The Florida Supreme Court issued its opinion on July 2, 2020 (App.A), and denied Mr. Pooler's timely motion for rehearing on September 22, 2020 (App. B). On March 19, 2020, this Court extended the time to file any petition for certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. Trial and Postconviction Proceedings

On February 13, 1995, Mr. Pooler was charged by indictment with first degree murder, burglary of a dwelling while armed with a firearm, and attempted first degree murder (R.1, 42-43), in Palm Beach County, Florida.

Following a jury trial, Mr. Pooler was found guilty on all counts on January 17, 1996 (T. 1321). The capital penalty phase commenced on February 7, 1996 (T. 1362). By a vote of 9-3, the jury recommended a sentence of death (T. 1630). The trial court sentenced Mr. Pooler to death on March 29, 1996 (T. 1700).

On direct appeal, the Florida Supreme Court affirmed Mr. Pooler's convictions and sentences, including his sentence of death. *Pooler v. State*, 704 So.2d 1375 (Fla. 1997). This Court denied certiorari review. *Pooler v. Florida*, 525 U.S. 848 (1998).

On September 17, 1999, Mr. Pooler filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 (PC-R. 1-22). Following an evidentiary hearing, the circuit court entered an order denying relief on November 4, 2005 (PC-R. 1961-2055). The Florida Supreme Court subsequently affirmed the denial of relief. *Pooler v. State*, 980 So.2d 460 (Fla. 2008).

On or about May 19, 2008, Mr. Pooler sought federal habeas relief in the United States District Court for the Southern District of Florida. *Pooler v. Sec'y, Fla. Dep't. of Corr.*, No. 9:08-cv-80529-KAM. On March 19, 2012, the habeas petition was denied.

Mr. Pooler was permitted to appeal a single issue to the Eleventh Circuit Court of Appeals, which affirmed the denial of the writ of habeas corpus. *Pooler v. Sec'y,*

Fla. Dep't. of Corr., 702 F.3d 1252 (11th Cir. 2012). This Court subsequently denied certiorari. *Pooler v. Crews*, 134 S.Ct. 191 (2013).

On May 25, 2016, Mr. Pooler filed a successive motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851; the motion was premised on this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 134 S.Ct. 1986 (PC-R2. 26-53). The State responded on July 15, 2015 (PC-R2. 61-85). On January 4, 2017, Mr. Pooler filed an amended Rule 3.851 motion, adding claims concerning *Hurst v. Florida*, 136 U.S. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (PC-R2. 339-78). The State responded on April 13, 2016 (PC-R2. 152-77). At the direction of the circuit court, Mr. Pooler filed a second amended Rule 3.851 motion on April 13, 2017 (PC-R2. 178-210), and the State thereafter responded (PC-R2. 202-27). On October 12, 2018, the circuit court entered an order denying Mr. Pooler's successive Rule 3.851 motion (App. C). Mr. Pooler filed a timely appeal to the Florida Supreme Court (PC-R2. 253-54).

By opinion dated July 2, 2020, the Florida Supreme Court affirmed the denial of Mr. Pooler's Rule 3.851 motion (App. A). Rehearing was denied on September 22, 2020 (App. B).

B. The Florida Supreme Court's Opinion

In his successive state court litigation, Mr. Pooler alleged, *inter alia*, that his death sentence violated the Sixth, Eighth, and Fourteenth Amendments because the statutory construction of Florida's capital sentencing statute as explained by the Florida Supreme Court in *Hurst v. State*, 202 So.3d 40, was substantive criminal law

that had to be applied retroactively to the date of his crime. The Florida Supreme Court rejected this claim, writing:

> Second, Pooler is not entitled to *Hurst* relief. *See State v. Poole*, 45 Fla. L. Weekly S41, S48, ___ So.3d ___, 2020 WL 3116597 (Fla. Jan. 23, 2020) ("The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona*, [536 U.S. 584 (2002)] and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt."); *Pooler*, 704 So.2d at 1377 ("[Pooler] was convicted of burglary and attempted first-degree murder with a firearm."). . . .

302 So.3d at 745. This was despite the fact that before the relevant sentencing range included a death sentence which could be imposed on a defendant convicted of first degree murder, the judge "shall set forth in writing its findings upon which the sentence of death is based **as to the facts**:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(1)–(3), Fla. Stat. (2012) (emphasis added).

REASONS FOR GRANTING THE WRIT

I THE FLORIDA SUPREME COURT'S ACTION IN CONSTRUING ITS DEATH PENALTY STATUTE IN *HURST V. STATE* TO SET FORTH ELEMENTS IN CAPITAL MURDER IN 2016 ONLY TO RECEDE FROM THAT STATUTORY CONSTRUCTION IN 2020 RAISES IMPORTANT CONSTITUTIONAL ISSUES WARRANTING RESOLUTION BY THIS COURT.

In his briefing to the Florida Supreme Court, Mr. Pooler argued that the Florida Supreme Court, in *Hurst v. State*, construed §941.141, Florida Statutes. Under the Eighth and Fourteenth Amendments, the resulting construction of that

statute constitutes substantive law which governs both of his capital cases. The Florida Supreme Court rejected Mr. Pooler's claim on the merits, relying on its 2020 decision in *State v. Pooler*, where it had receded in part from *Hurst v. State*. 302 So.3d at 745.

A. The Florida Supreme Court's decision in *Hurst v. State* constitutes substantive law applicable at the time of Mr. Pooler's offense

The Florida Supreme Court's construction of § 921.141 in *Hurst v. State* constitutes substantive law, and due process demands that the law provided thereby was the law in 1995, when the charged Mr. Pooler with first degree murder and related offenses.

In *Hurst v. State*, the Florida Supreme Court construed the version of Fla. Stat. § 921.141 that was in effect from the statute's enactment in 1973 until it was changed in 2016. It identified the requisite facts a judge was required to find in order for the range of punishment available on a first-degree murder conviction to be increased to include death as a sentence. *Id.* at 53. The court explained,

> [The imposition of . . . death . . . in Florida has in the past **required, and continues to require, additional factfinding** that now must be **conducted by the jury**. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308[, 313] . . . (1991), under Florida law, "**The death penalty may be imposed only where** *sufficient aggravating circumstances* **exist that** *outweigh* **mitigating circumstances**. . . ." (quoting § 921.141(3), Fla. Stat. (1985)). 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**.

202 So.3d at 53 (Emphasis in italics in original) (all other emphasis added).

Importantly, the Florida Supreme Court explained that because the statutorily defined facts were necessary to increase the range of punishment to include death, proof of those facts was necessary "to essentially convict a defendant of capital murder." 202 So. 3d at 53. This meant that the statutorily identified facts were, in essence, elements of a higher degree of murder. In turn that meant that under the Due Process Clause, the State had the burden of proving those statutorily identified facts beyond a reasonable doubt. The Florida Supreme Court noted,

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing . . . 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 [aggravators] are sufficient to impose death, unanimously find that the [aggravators] 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 [aggravators] were proven, were sufficient to impose death, and that they outweigh the [mitigators].

Id. at 57–58.

The statutory construction contained in *Hurst v. State* constitutes Florida's substantive law. *Hurst v. State* read the plain language of the statute identifying the required factual determination and concluded that the factual determinations were essentially elements of a higher degree of murder which pursuant to the Sixth Amendment was subject to right to a jury trial, and pursuant to the Due Process Clause had to be proved by the State beyond a reasonable doubt. When a court construes a statute and identifies the elements of a statutorily defined criminal

offense, the ruling constitutes substantive law and dates to the statute's enactment. *See Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* . . . 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."); *see also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.").

The Fourteenth Amendment requires that this substantive law govern the law that existed at the time of the offense. The Florida Supreme Court's statutory construction of Fla. Stat. § 921.141 in *Hurst v. State* constitutes substantive criminal law. The court construed the meaning of the statute back to, at least, the date of the criminal offense. In Mr. Pooler's case, that date would be 1995. *See* Savings Clause of the Florida Constitution, Art. X, § 9 ("Repeal of a criminal statute shall not affect prosecution for any crime committed before such repeal."). So—as substantive law—*Hurst v. State* was not subject to the retroactivity analysis of either *Witt v. State*, 387 So. 2d 922 (Fla. 1980), or *Teague v. Lane*, 489 U.S. 288 (1989).

After *Hurst v. State*, the Florida Legislature made changes to § 921.141 to comply with the judicial ruling. When doing so, the Legislature did not express any disagreement with the Florida Supreme Court's reading of the statute and its conclusion that the aggravating factors had to be found sufficient as a matter of fact

before a death sentence could be authorized as an appropriate punishment. This shows that the Florida Legislature believed that the Florida Supreme Court correctly read § 921.141 in *Hurst v. State*. *See Fla. Dep't of Children and Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004) ("The Legislature is presumed to know the judicial constructions of a law when amending that law, and . . . is presumed to have adopted prior judicial constructions . . . unless a contrary intention is expressed.").

Under *Fiore v. White*, 531 U.S. 225, 228–29 (2001), the statutory construction in *Hurst v. State*—based on the plain language of the statute—dated back to the enactment of the statute. The Fourteenth Amendment forbids the State to convict a defendant of a crime without first proving the elements of that crime beyond a reasonable doubt. *See also, e.g., Bunkley v. Florida*, 538 U.S. 835, 842 (2003) (courts should not only strive to determine whether a law has changed, but when it changed, or came to be enacted). Therefore, pursuant to the Fourteenth Amendment, the statutory construction set forth in *Hurst v. State* must have been the governing law in 1995, when the offenses at issue here occurred. *See, e.g., Fiore*, 531 U.S. 225 (A state court's construction of the state's statutory law is binding even on the Supreme Court of the United States).

B. In *State v. Poole*, the Florida Supreme Court retroactively rejected its construction of the statute set out in *Hurst v. State*, and thereby retroactively changed Florida's substantive criminal law.

In *State v. Poole*, the Florida Supreme Court revisited its 2016 decision in *Hurst v. State* and announced it was receding from *Hurst v. State*, stating "our Court was wrong in *Hurst v. State* when it held that the existence of an aggravator and the

sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously." *Poole* did not dispute that § 921.141 required these findings to be made before a death sentence could be imposed. Instead, it indicated that the determinations that the statute required were sentencing factors and not elements as *Hurst v. State* had held. Whether a required finding is an element of the offense or a sentencing factor was held to be a matter constitutional law in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). But changing an element into a sentencing factor results in a change in the substantive law.

Normally, due process precludes a court from unexpectedly changing a criminal statute's construction and applying the change retroactively, something that state legislatures cannot do by virtue of the Ex Post Facto Clause. *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964). For example, due process prohibits the retroactive application of judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451 461 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). By changing the construction of the statute, as the Florida Supreme Court did in *Poole*, and by applying that change to Mr. Pooler, as it did in the decision below, the Florida Supreme Court arguably violated the Due Process Clause of the Fourteenth Amendment.

Certainly, *Poole* was unexpected. *Poole* is also indefensible, because the statutory construction set forth in *Hurst v. State* with the conclusion that the requisite findings were elements has been applied in a large number of cases where

the crime was committed pre-*Ring*, the corresponding death sentences were vacated, and unanimous juries returned binding life sentences. For example, a Florida state court applied *Hurst v. State*'s statutory construction to William Melvin White's case, which was a homicide committed in 1978. The circuit court for Orange County, Florida, vacated White's death sentence on the basis of *Hurst v. State*. *Florida v. White*, 1978-CF-1840-C-O (Circuit Court of Orange Cty., Fla. Sept. 19, 2017); *see White v. State*, 817 So. 2d 799 (Fla. 2002) (per curiam); *White v. State*, 729 So. 2d 909 (Fla. 1999) (per curiam); and *White v. State*, 415 So. 2d 719 (Fla. 1982) (per curiam).[1] After the circuit court vacated White's death sentence, the State did not pursue another death sentence. Instead, the court imposed a life sentence.

Poole is likewise indefensible because the Florida Legislature demonstrated its agreement with the statutory construction of § 921.141, as set forth in *Hurst v. State*. Indeed, the Legislature did not challenge the decision as contrary to its intent when the statute was amended during the 2017 legislative session. Pursuant to separation of powers as stated in the Florida Constitution, the Legislature surely has the authority to complain when the Florida Supreme Court construes a statute contrary to legislative intent. The Florida Legislature did not indicate that *Hurst v. State* had

[1] *See also Card v. Jones*, 219 So.3d 47 (Fla. 2017) (applying *Hurst v. State*'s statutory construction to Card's case, which was a homicide committed in 1981, and vacated his sentence of death). By virtue of the Florida Constitution's Savings Clause, the ruling in *Card* means that the statutory construction adopted in *Hurst v. State* was Florida's substantive criminal law at the time of the offense therein, June 1981. *See Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015) (The Florida Supreme Court determined that "the purpose of the 'Savings Clause' is to require the statute in effect at the time of the crime to govern the sentence an offender receives. . .").

construed Fla. Stat. § 921.141 in a manner inconsistent with, or contrary to, its legislative intent during its 2018 or 2019 legislative session.[2]

Poole arguably cannot be applied retroactively under due process pursuant to *Bouie* and *Rogers*. Surely, due process does not permit *Poole* to erase *Hurst v. State* out of existence. It cannot undo the construction of § 921.141 that *Hurst v. State* employed, because such statutory construction was and remains the binding substantive law as to offenses committed prior to January 23, 2020. In *Poole*, decided just three and a half years after *Hurst v. State*, the Florida Supreme Court chose to recede from *Hurst v. State* and make it easier for the State to obtain death sentences. This change operated to the detriment of defendants and was entirely unexpected. Due process should mandate that *Poole* is not applicable to offenses committed after January 23, 2020. *See Bouie*, 378 U.S. at 362 ("We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute . . . has deprived petitioners of [due process]. If South Carolina had applied to this case its new statute prohibiting the act [in question], the constitutional proscription of ex post facto laws would clearly invalidate the convictions. [Due process] compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute.").

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[2] And, after the Florida Supreme Court issued *Poole*, the Legislature left Fla. Stat. § 921.141 intact, as adopted, to accommodate the Sixth Amendment ruling in *Hurst v. State.* The Florida Legislature's reaction to *Hurst v. State,* and *Poole,* shows that the Florida Supreme Court in *Hurst v. State* correctly read the statute and captured the legislative intent in its construction thereof.

Since the homicides at issue in Mr. Pooler's case occurred long before January 23, 2020, *Poole* is not applicable. Due process principles should not allow *Poole* to retroactively replace *Hurst v. State* as substantive law since it operates to Mr. Pooler's detriment. *Poole* should merely replace *Hurst v. State* going forward in time from January 23, 2020.

At least thirty-three inmates in Florida have been resentenced to life imprisonment under *Hurst*. Six new non-*Hurst* related defendants have been sentenced to life under the current death penalty statute left undisturbed by *Poole*. There is no meaningful difference between Mr. Pooler's case and those cases in which the courts granted *Hurst* relief and imposed life sentences, save the arbitrariness of a date. Death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-885, 887 n. 24 (1983)). The Florida Supreme Court's zig zag in its construction of § 921.141(3) should be examined by this Court to determine whether Mr. Pooler's due process rights were violated.

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. Pooler's case.

The 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

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to review the decision of the Florida Supreme Court.

Respectfully submitted,

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