No. _____

OCTOBER TERM 2021

IN THE SUPREME COURT OF THE UNITED STATES

JOEL DALE WRIGHT,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

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

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's statutory construction in *Hurst v. State* constitutes substantive law, and if so, whether the Due Process Clause of the Fourteenth Amendment requires that this substantive law govern the law in existence at the time of Mr. Wright's alleged offense?

2. Whether the erratic manner in which *Hurst v. State* has been applied provides a principled way to distinguish between those who receive a death sentence and those who do not in accord with the Eighth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Joel Dale Wright, a death-sentenced individual in the state of Florida, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Per Rule 14.1(b)(iii) of the Rules of the Supreme Court of the United States, the following cases relate to this petition:

Underlying Trial:
Circuit Court of Putnam County, Florida
State of Florida v. Joel Dale Wright, Case No. 83-376CF
Judgment Entered: September 23, 1983

Direct Appeal:
Florida Supreme Court, Case No. SC60-64391
Wright v. State, 473 So. 2d 1277 (Fla. 1985)
Judgment Entered: July 3, 1985

Supreme Court of the United States, Case No. 85-5747
Wright v. Florida, 474 U.S. 1094 (1986)
Judgment Entered: January 21, 1986

Initial Postconviction Proceedings:
Circuit Court of Putnam County, Florida
State of Florida v. Joel Dale Wright, Case No. 83-376CF
Judgment Entered: June 6, 1989

Florida Supreme Court, Case No. SC60-74775
Wright v. State, 581 So. 2d 882 (Fla. 1991)
Remanded to Lower Court for Evidentiary Hearing: May 9, 1991

Initial Postconviction Proceedings on Remand:
Circuit Court of Putnam County, Florida
State of Florida v. Joel Dale Wright, Case No. 83-376CF
Judgment Entered: June 5, 2000

Florida Supreme Court, Case No. SC00-1389
Wright v. State, 857 So. 2d 861 (Fla. 2003)
Judgment Entered: July 3, 2003

State Habeas Proceedings
Florida Supreme Court, Case No. SC01-2866
Wright v. Sec'y, Fla. Dep't of Corr., 857 So. 2d 861 (Fla. 2003)
Judgment Entered: July 3, 2003

Supreme Court of the United States, Case No. 03-8419
Wright v. Sec'y, Fla. Dep't of Corr., 541 U.S. 961 (2004)
Judgment Entered: March 29, 2004

First Successive Postconviction Proceedings
Circuit Court of Putnam County, Florida
State of Florida v. Joel Dale Wright, Case No. 83-376CF
Judgment Entered: March 23, 2006

Florida Supreme Court, Case No. SC06-2353
Wright v. State, 995 So. 2d 324 (Fla. 2008)
Judgment Entered: September 25, 2008

Federal Habeas Proceedings
United States District Court for the Middle District of Florida
Wright v. Sec'y, Fla. Dept. of Corr., No. 3:09-cv-99-J-32JBT, 2013 WL 1137478, at *1 (M.D. Fla. Mar. 19, 2013)
Judgment Entered: March 19, 2013

United States Court of Appeals for the Eleventh Circuit, Case No. 13-11832
Wright v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1256 (11th Cir. 2014)
Judgment Entered: August 4, 2014

Supreme Court of the United States, Case No. 14-9020
Wright v. Sec'y, Fla. Dep't of Corr., 135 S. Ct. 2380 (2015)
Judgment Entered: June 1, 2015

State Habeas Proceedings
Florida Supreme Court, Case No. SC12-1385
Wright v. Sec'y, Fla. Dep't of Corr., 126 So. 3d 1060 (Fla. 2013) (unpublished table decision)
Judgment Entered: October 3, 2013

Second Successive Postconviction Proceedings
Circuit Court of Putnam County, Florida
State of Florida v. Joel Dale Wright, 83-376CF
Judgment Entered: October 8, 2019

Florida Supreme Court, Case No. SC19-2123
Wright v. State, 312 So. 3d 59 (Fla. 2021)
Judgment Entered: January 7, 2021
Rehearing Denied: March 10, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joel Dale Wright, is a condemned prisoner in the State of Florida. Petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The Florida Supreme Court's opinion that is the subject of this Petition is reported as *Wright v. State*, 312 So. 3d 59 (Fla. 2021), and attached hereto as "Appendix A." The Florida Supreme Court's order denying Mr. Wright's motion for rehearing is unreported but referenced as *Wright v. State*, No. SC19-2123, 2021 WL 914174, at *1 (Fla. Mar. 10, 2021), and is attached hereto at "Appendix B." The state circuit court order denying Mr. Wright's successive motion for postconviction relief is unreported and attached hereto as "Appendix C."

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its opinion on January 7, 2021, and denied Mr. Wright's timely Motion for Rehearing on March 10, 2021. This petition is timely filed in light of the Court's directive due to the COVID-19 pandemic extending the deadline to file any petition for writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower court order denying a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), with Petitioner having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant 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 relevant 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 CASE AND PROCEDURAL HISTORY

I. INTRODUCTION

A. Facts As Reported In Justice Blackmun's Dissent

Justice Blackmun, joined by Justices Brennan and Marshall, voted to grant certiorari in Mr. Wright's case in 1986 "to ensure that the Florida courts have not sentenced a man to die based on a conviction obtained in violation of the Sixth Amendment." *Wright v. Florida*, 474 U.S. 1094, 1094-95 (1986) (Blackmun, J., joined by Brennan, J., and Marshall, J., dissenting). Justice Blackmun summarized the facts in his dissent as follows:

> On February 6, 1983, a woman was found murdered in the bedroom of her home. She apparently had died the previous night after being raped and stabbed. All the doors to her home were locked, but a back window was found open. Several weeks later, Charles Westberry told his wife that petitioner Joel Wright had come to Westberry's trailer shortly after daylight on the morning of February 6 and had confessed to killing the victim. Wright lived with his parents near the victim's home. Westberry's wife notified the police, and Wright was arrested and tried for the crime. At trial, Westberry was the State's principal witness. He

testified that Wright had told him on the morning of February 6 that Wright had entered the victim's house through the back window to steal money, that the victim had discovered him as he was wiping his fingerprints from her purse, and that he had killed her because he did not want to return to prison. According to Westberry, Wright counted out $290 he claimed to have taken from the victim's home, and he asked Westberry to tell the authorities that Wright had spent the previous night at Westberry's trailer. Another witness [Paul House] for the State testified that, approximately one month before the murder, he and Wright had stolen money from the victim's home after entering through the window later found open on February 6. The jury also was told that a fingerprint identified as Wright's had been found on a portable stove in the victim's bedroom.

Wright took the stand and denied involvement in the murder. He testified that he had returned home from a party at approximately 1 a.m. on February 6, but had found himself locked out. He claimed that he then had walked along Highway 19 to Westberry's trailer, where he had spent the night. He also presented a witness who testified that, late on the night of February 5 and early in the morning of February 6, he had seen a group of three men, whom he had not recognized, in the general vicinity of the victim's home.

After the close of evidence but prior to final arguments, the defense moved to re-open the case in order to introduce the testimony of a newly discovered witness, Kathy Waters. Waters apparently had read newspaper accounts of the trial, had listened to parts of the testimony, and had discussed the trial with friends in attendance. She offered to testify that, shortly after midnight on February 6, she had seen a person who could have been Wright walking along Highway 19, and had also observed three persons she did not recognize near the victim's home. Waters claimed that she had not realized she possessed relevant information until the morning her testimony was proffered, and that she had come forward of her own volition. The trial judge denied Wright's motion, noting that Florida's sequestration rule would be rendered "meaningless" if, after discussing the case with others, a witness were permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made." [*Wright v. State*,] 473 So. 2d 1277, 1279 ([Fla.] 1985). Although the State acknowledged that the violation of the sequestration rule had been inadvertent, it argued that the prosecution "could very well be substantially prejudiced" if Waters were permitted to testify. *Id.*, at 1280. Wright was convicted and sentenced to die.

On appeal, the Supreme Court of Florida held that the trial judge's rigid application of the State's sequestration rule was inconsistent with

> Wright's Sixth Amendment right to present witnesses in his behalf. The court affirmed the conviction, however, because it deemed the error harmless.

Id.

B. Additional Facts

As reflected in Justice Blackmun's dissent, the issue at trial came down to one of credibility. This case at its core factually hinges upon one man's word against another: Charles Westberry, the State's main witness, and Joel Dale Wright. Mr. Wright has consistently told the same story. In contrast, Mr. Westberry's story has changed repeatedly on key facts.

In his initial statement to the police two days after the murder, Mr. Westberry told the police that Mr. Wright had arrived at his trailer around 1:30 a.m. on February 6 and spent the rest of the night on the living room couch. (R. 2156, 2168) Three other people who lived in the trailer gave consistent statements. Denise Easter, Mr. Westberry's girlfriend, testified at trial that she and Mr. Westberry had gone to bed around 1:00 a.m., and when she woke up the next morning, Mr. Wright was asleep on the couch, and she did not see any blood on his clothes. (R. 1924, 1927) Mr. Westberry's brother, Allen, testified that he saw Mr. Wright on the couch at 7:00 a.m. and also did not see any blood on him. (R. 1944-46) Beverly Westberry, Allen's wife, testified she saw Mr. Wright on the couch when she got up at 6:30 a.m. and did not see anything on him that looked like blood (R. 1953-54, 1957) Allen and Beverly Westberry's son, Travis, is the person who woke Mr. Wright up that morning while he was sleeping on the couch. (R. 1955)

Two plus months later, on April 15, 1983, Mr. Westberry's story changed

significantly when he relayed a different account to his estranged wife, Paige Westberry. He told Paige that Mr. Wright was making trouble for him and that Mr. Wright had confessed to the murder. (R. 2172, 2175, 2473) According to Paige, Mr. Westberry told her that Mr. Wright arrived at the trailer, covered in blood, between 7:00 and 7:30 a.m. on Sunday morning and confessed that he had used a kitchen knife to cut Ms. Smith's throat. (PCR-1. 41-42) Not only was this drastically different from his initial statement to police, but it was also inconsistent with the evidence that the victim had been killed with a pocketknife. (R. 1822) Mr. Westberry also added another new "fact," stating that Mr. Wright showed him $243.00 in small bills when he showed up at his trailer. (PCR-1. 41-42).[1] Paige relayed this story to a police officer whom she was dating. (PCR-1. 677) Three days later on April 18, 1983, police arrested Mr. Westberry and charged him as accessory to murder. (R. 2159-60) Faced with these charges, Mr. Westberry agreed to testify against Mr. Wright in return for immunity. (PCR-2. 2415-17)

But this case is not just about Mr. Westberry's flip-flopping storytelling; it is also about Henry Jackson and Clayton Strickland, two men whose behavior should have raised red flags to the police but who were instead removed from the investigation inquiry early.[2] At the time of the murder, Mr. Jackson and Mr.

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[1] Apparently, Mr. Westberry was not wedded to the details of his stories, as the amount changed to $290.00 when he testified at trial. (R. 2137-38) Mr. Westberry seemed to struggle with the details of the bloody clothing as well, as at trial he testified to a different version of event that involved considerably less blood on Mr. Wright. (R. 2168, 2175)

[2] Detective Douglas testified at a 1988 evidentiary hearing that Mr. Jackson and Mr. Strickland were eliminated as suspects after they passed their polygraphs and were thus eliminated as suspects (PCR-1. 964), but in a subsequent evidentiary

Strickland were roommates and lived about a block away from Ms. Smith's house. (PCR-1. 965) Both Mr. Jackson and Mr. Strickland were interviewed by police on February 10, 1983. According to Mr. Jackson's statement, he and Mr. Strickland went to bed early on Saturday, February 5. (PCR-1. 378) Similarly, Mr. Strickland told police he and Mr. Jackson drank a lot on Saturday, were pretty high, and both went to bed around 8:00 p.m. (PCR-1. 379) Mr. Strickland also stated that the last time he had seen Ms. Smith was on Tuesday or Wednesday of the previous week. (PCR-1. 379) But a quick review of the events leading up to and following Ms. Smith's murder shows that Mr. Jackson and Mr. Strickland should not have been ruled out so quickly.

On February 4, 1983, two days before Ms. Smith was found dead, a neighbor of Ms. Smith's, Charlene Luce, had an odd interaction with Mr. Strickland and Mr. Jackson. Mr. Strickland approached her and made the statement that even though Mr. Jackson might kill him, he was not scared of him. (PCR-2. 445) Ms. Luce then observed Mr. Jackson come outside into the yard brandishing a pocketknife in his right hand, saying that Mr. Strickland had his money. (PCR-2. 445)[3]

The next day, February 5, 1983, day before Ms. Smith was found dead, Wanda Brown, a mail carrier, observed Ms. Smith outside her residence arguing with Mr. Strickland and Mr. Jackson. (PCR-2. 447)[4] Mr. Strickland, who was intoxicated, then

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hearing in 1997, Detective Douglas testified that only Mr. Wright, Mr. Westberry, Mr. House, and Ms. Easter were polygraphed. (PCR-2. 2520) Thus, the sole basis for excluding Mr. Jackson and Mr. Strickland as suspects was revealed to be nonexistent.

[3] As noted previously, the weapon used to murder Ms. Smith was a pocketknife. (R. 1822)

[4] This is inconsistent with Mr. Smith's February 10, 1983, statement to police that he had not seen Ms. Smith since Tuesday or Wednesday of the previous week.

walked up to the door of Ms. Brown's vehicle and demanded to know if she had his social security check. (PCR-2. 447) Ms. Brown told Mr. Strickland that she did not have any mail for him. (PCR-2. 447) Then, Mr. Strickland asked Ms. Brown to give him some money, but she became scared and drove off. (PCR-2. 447)

Later that night, witness Idus Hughes drove by Ms. Smith's house and saw Mr. Jackson and two other men across the street from Ms. Smith's residence. (Supp. PCR-3. 13-15) Also on the same night, witness William Bartley saw Mr. Jackson and Mr. Strickland drinking and standing in the vacant lot next to Ms. Smith's house. (PCR-1. 1006-08)

On Sunday afternoon, February 6, 1983, the day Ms. Smith was found dead, Kim Holt, a supermarket cashier at a local store, saw Mr. Jackson in her checkout line with fresh scratches and blood on his face. (PCR-2. 444, 2583) Ms. Holt knew Mr. Jackson and was familiar with how he usually paid for his groceries with food stamps or bottles. (PCR-2. 444) But on that day, Mr. Jackson paid with a $100 bill. (PCR-2. 444, 258), despite the fact that he had been demanding money from the mail carrier the day before and that she had not delivered his social security check to him. Also while at the grocery story, Mr. Jackson asked Ms. Holt if she knew that Ms. Smith had been killed. (PCR-2. 444, 2583) As he was leaving, Ms. Holt noticed that it was 4:30 p.m. (PCR-2. 444) But Ms. Smith had only been found dead by her brother around 4:00 p.m. that day. (R. 1599-1601)

Between 4:30 and 5:00 p.m. on that same day, Mr. Jackson called Ms. Luce over to the fence and informed her that Ms. Smith had been killed. (PCR-2. 445, 2621)

When Ms. Luce asked, "why her," Mr. Jackson said that "Miss Smith told [me] that she didn't kept [sic] money at home." (PCR-2. 446) Mr. Jackson then told a story about how Ms. Smith once gave him a box of chocolates. (PCR-2. 445-46) Notably, Ms. Smith was found dead with a Hershey chocolate bar on her exposed abdomen. (R. 1717) When Ms. Luce asked Mr. Jackson if he killed Ms. Smith, he turned red in the face, looked at her "funny, and then walked away." (PCR-2. 445, 2622)

Finally, on Sunday, February 6, 1983, the day Ms. Smith was found dead, Mr. Strickland sold Ms. Smith's brother Mr. Smith a pocketknife for $5.00 between 2:00 and 3:00 pm. (R. 1598)

The erroneous ruling out of Mr. Jackson and Mr. Strickland changed the trajectory of this case and of Mr. Wright's life. Not only did the behavior of Mr. Jackson and Mr. Strickland around the time of the crime raise questions about their responsibility for Ms. Smith's murder, but Mr. Jackson's prior history should have raised red flags. Mr. Jackson had a burglary conviction for burglarizing Earl Smith's (the victim's brother) home, which was located across the street from Ms. Smith's house. (PCR-2. 2432, 2434-35) Moreover, Mr. Jackson had been previously convicted of murdering his brother-in-law. (PCR-2. 2616)

Mr. Wright's initial story that he walked to Mr. Westberry's after being locked out of his home was consistent with the testimony of everyone else at Mr. Westberry's home. In contrast, Mr. Westberry's trial testimony was inconsistent with the testimony of everyone else staying in the trailer and was further inconsistent with the medical examiner's trial testimony regarding time of death. The medical

examiner initially placed the time of Ms. Smith's death between 5:00 p.m. on Saturday night, February 5, 1983, when she was last seen alive by her brother, and 9:00 p.m. on Saturday night, February 6, 1983. (R. 1853) However, on May 17, 1983, after Mr. Westberry changed his story to state that Mr. Wright showed up on Sunday morning with blood on his clothes, the medical examiner amended his report and expanded the time range to include Sunday morning. (R. 1843) But at trial, the medical examiner conceded that Ms. Smith probably died between 5:00 p.m. and 9:00 p.m. on Saturday night because there was no food in her stomach which indicated to him that she had not eaten her dinner yet, because she was not in sleeping clothes which indicated to him that she had not changed her attire for bed yet, and because he had not received any additional information on her normal eating and sleeping habits. (R. 1826, 1849, 1853)

II. PROCEDURAL HISTORY

The homicide occurred on February 5, 1983. First adopted in 1885, Article X, Section 9 of the Florida Constitution required "the statute in effect at the time of the crime to govern" a criminal prosecution for the commission of the crime and "the sentence an offender [was to] receive[] for the commission of that crime." *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015).

On April 22, 1983, Petitioner Joel Dale Wright was charged by indictment with one count of first-degree murder and other related offenses arising from the death of Lima Paige Smith, who was found dead in her home nearly three months earlier.[5] (R.

[5] The other offenses charged in the indictment included one count of sexual battery with great force, one count of burglary of a dwelling, and one count of grand

5) Resolutely maintaining his innocence, Mr. Wright entered pleas of not guilty on all counts. (R. 37)

The case proceeded to trial four months later on August 22, 1983. During the voir dire process preceding the guilt phase, Mr. Wright's appointed trial counsel, Howard Pearl, objected to instructions advising venire members that the judge would decide Mr. Wright's sentence if convicted:

> THE COURT: Let me - - let me make this observation to you, ma'am, and these instructions will come to you later in the case in more detail. **The penalty to be imposed in any criminal case, under the laws of the State of Florida, is strictly up to this Judge.**
>
> A VENIRE MAN: I know.
>
> THE COURT: The law mandates certain penalties upon convictions, but **the actual penalty to be imposed** within a certain range of penalties, and you'll have those explained to you, **are up to me, and to me alone**. . . .
>
> MR. PEARL: Your Honor, you understand that I am obliged to keep one eye and one ear on the record.
>
> THE COURT: Yes, sir.
>
> MR. PEARL: And I most respectfully except to the instruction given to Mrs. Torres with respect to who decides the death penalty.
>
> THE COURT: All right, sir. Your exception is noted.

(R. 981-82) (emphasis added) Shortly thereafter, the prosecution reiterated the trial court's statement to potential jurors that the judge alone bears responsibility for deciding the sentence. The prosecution explicitly advised: "[R]egardless of your recommendation the final decision rests with the Judge as to the penalty to be

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theft of the second degree. (R. 5)

imposed. **He imposes the sentence, juries don't**." (R. 990) (emphasis added)

On September 1, 1983, the jury returned verdicts convicting Mr. Wright of first-degree murder and each related offense. (R. 688) The penalty phase proceeding was conducted the following morning, and prior to deliberating, Mr. Wright's jury was again instructed that "the final decision as to what punishment shall be imposed [was] the responsibility of [the] Judge." (R. 2997) The court continued by telling the jury that the sentence it rendered would be advisory "based upon [its] determination as to whether sufficient aggravating circumstances exist[ed] to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist[ed] to outweight [sic] any aggravating circumstances found to exist." (R. 2997) Later that same morning, the jury returned with an advisory recommendation of death by a vote of 9 to 3. (R. 695, 3008) The jury did not make any of the statutorily required findings of fact codified in § 921.141(3), Fla. Stat. (2012).

On September 23, 1983, the trial court followed the jury's advisory recommendation and sentenced Mr. Wright to death.[6] In imposing this sentence, the court alone found four aggravating circumstances: (1) the murder took place after the defendant committed rape and burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was especially heinous, atrocious, or cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The

[6] The trial court also sentenced Mr. Wright to 99 years in Florida Department of Corrections' custody for the sexual battery count, 15 years for the burglary count, and 5 years for the grand theft count. (R. 715-21)

court further determined that no mitigating circumstances were present and found that "there [were] sufficient aggravating circumstances to justify imposition of the sentence of death." (R. 707-14)

On direct appeal, the Florida Supreme Court affirmed Mr. Wright's convictions and death sentence despite finding that the trial court committed errors during both the guilt and penalty phases that violated Mr. Wright's constitutional rights.[7] *Wright v. State*, 473 So. 2d 1277 (Fla. 1985), *cert. denied*, 474 U.S. 1094 (1986). In upholding Mr. Wright's death sentence, the Florida Supreme Court also rejected Mr. Wright's claim that § 921.141, Fla. Stat. (1983), violated the Sixth and Fourteenth Amendments to the United States Constitution by denying him due process of law, in that the existence of aggravating and/or mitigating circumstances, as questions of fact, were found by the trial judge as opposed to a jury of his peers.[8] *Id.* at 1281-82. The court also rejected Mr. Wright's claim that Florida's capital sentencing statute

[7] The first error was the trial court's application of the sequestration rule as a strict rule of law, which resulted in the exclusion of newly discovered testimony from Kathy Waters that would have undermined the State's theory of the case and supported Mr. Wright's innocence. *Wright v.* State, 473 So. 2d at 1279-81. Because it "conclude[d] that the excluded evidence would not have affected the verdict," the Florida Supreme Court found this Sixth Amendment violation harmless beyond a reasonable doubt. *Id.* at 1280-81. The second error concerned the trial court's finding that the murder of Lima Smith was committed in a cold, calculated, and premeditated manner. *Id.* at 1282. Because "heightened premeditation was not proved beyond a reasonable doubt," the Florida Supreme Court struck this aggravating factor from the sentencing calculus; however, the court found it "unnecessary to remand for a new sentencing hearing" because "the [trial] court properly found there were no mitigating and three aggravating circumstances." *Id.*

[8] This claim appeared as Point IX in Mr. Wright's initial brief on direct appeal. *See* Initial Br. of Appellant 42-44, May 3, 1984.

was unconstitutional on its face and as applied.[9] *Id.*

Mr. Wright's convictions and sentence of death became final upon this Court's denial of his Petition for Writ of Certiorari on January 21, 1986. *Wright v. Florida*, 474 U.S. 1094 (1986). Three members of this Court took issue with the Florida Supreme Court's determination that the trial court's decision to preclude Kathy Waters from testifying was harmless error and would have "grant[ed] certiorari in this capital case to ensure that the Florida courts have not sentenced a man to die based on a conviction obtained in violation of the Sixth Amendment."[10] *Id.* at 1094 (Blackmun, J., dissenting).

On February 22, 1988, Mr. Wright filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, which he later amended.[11] (PCR-1. 1-153) An evidentiary hearing was held before Putnam County Circuit Court Judge Robert Perry in October 1988, and on June 8, 1989, Judge Perry

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[9] This claim appeared as Point X in Mr. Wright's initial brief on direct appeal. *See* Initial Br. of Appellant 45-47, May 3, 1984.

[10] Because "this case comes down to Wright's word against [Charles] Westberry's," the dissenting members of this Court "would [have] granted certiorari, vacate[d] the judgment, and remand[ed] for a determination whether there [was] any 'reasonable possibility' that the automatic exclusion of Waters' testimony contributed to Wright's conviction." *Wright v. Florida*, 474 U.S. at 1096-97 (Blackmun, J., dissenting).

[11] Claim XIV of Mr. Wright's amended motion for postconviction relief alleged that Mr. Wright's sentencing jury was repeatedly misinformed and misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), and in violation of the Eighth and Fourteenth Amendments. (PCR-1. 133-44) Claim XV of Mr. Wright's amended motion further alleged that the jury was misled and incorrectly informed about its function at capital sentencing, in violation of the Eighth and Fourteenth Amendments. (PCR-1. 144-46)

entered an order denying relief on all eighteen claims Mr. Wright raised. (PCR-1. 1084-92)

On June 22, 1989, Mr. Wright filed a Motion for Rehearing and Motion to Amend with newly discovered evidence that emerged after the 1988 hearing involving trial counsel Howard Pearl's status as a special deputy sheriff at the time he represented Mr. Wright. (PCR-1. 1167-1271) On August 2, 1989, Judge Perry issued an order summarily denying relief on the "Pearl issue" on the basis of the decision of another judge in a different case in which an evidentiary hearing had been conducted.[12] (PCR-1. 1272-73) On appeal, the Florida Supreme Court quoted Judge Perry's order verbatim before affirming the denial of relief on each of the claims raised in Mr. Wright's initial Rule 3.850 motion. *Wright v. State*, 581 So. 2d 882, 886 (Fla. 1991). However as to the claim regarding Howard Pearl's conflict of interest, the Florida Supreme Court found "that due process principles require[d] an evidentiary hearing . . . on whether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." *Id.* at 886-87. In its opinion, the court expressly authorized Mr. Wright's case to be consolidated with other capital defendants making a similar claim. *Id.* at 886.

Pursuant to the Florida Supreme Court's directive and over Mr. Wright's

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[12] Judge Perry did not disclose that while he presided over Mr. Wright's case, he too was a special deputy sheriff in Putnam County. (Exh. 40, Pellicer Depo., at 19) Moreover, on October 3, 1991, Judge Perry resigned from his position as a circuit court judge in a settlement of judicial inquiry that alleged judicial improprieties. (PCR-2. 2590-92, Exh. 44) The inquiry concerned judicial misconduct in 1988 and 1989 involving improper ex parte conduct and not displaying impartiality. (PCR-2. 1049-50) This information was included in an amended Rule 3.850 motion that Mr. Wright filed on February 22, 1993. (PCR-2. 480-505)

objection, a consolidated evidentiary hearing was conducted in December 1992 before Judge B.J. Driver with other capital cases in which Howard Pearl had been the state-paid defense attorney.[13] The Florida Supreme Court later ruled in *Teffeteller v. Dugger*, 676 So. 2d 369, 371 (Fla. 1996), that this process "was procedurally flawed and violated the appellants' right to due process," so another evidentiary hearing was ordered in Mr. Wright's case.

Meanwhile on December 11, 1991, Mr. Wright filed an amended Rule 3.850 motion based on exculpatory information contained in previously undisclosed public records from the Putnam County Sheriff's Office. (PCR-2. 115-218) Mr. Wright later amended this motion again on October 8, 1997, following additional public records disclosure from the same agency. (PCR-2. 912-67) An evidentiary hearing was held before Judge A. W. Nichols in March and December of 1997, and an order denying relief on all pending claims was issued on June 5, 2000. (PCR-2. 1137-40)

Mr. Wright thereafter appealed to the Florida Supreme Court. He also filed a state habeas petition wherein he argued that in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the court should revisit its rejection of his argument on direct appeal that the provision in § 921.141 requiring the presiding judge to make the findings of fact necessary to support a sentence of death as opposed to a jury of one's peers violated the Sixth and Fourteenth Amendments. *See* Pet. for Writ of Habeas Corpus 49-51, Dec. 31, 2001. While Mr. Wright's petition was pending, this Court issued *Ring v. Arizona*, 536 U.S. 584 (2002), and Mr. Wright sought to amend his petition based

[13] Following the consolidated evidentiary hearing on the Pearl issue, Judge Driver issued an order on April 2, 1993, denying Mr. Wright relief.

on that decision. However, in a consolidated opinion, the Florida Supreme Court affirmed the circuit court's denial of postconviction relief and denied the habeas petition altogether. *Wright v. State*, 857 So. 2d 861 (Fla. 2003). In doing so, the court rejected Mr. Wright's challenge to his death sentence based on *Apprendi* on the merits with the following analysis:

> Wright's third claim involves the constitutionality of his sentence based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Apprendi* holds that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Supreme Court has recently extended the holding in *Apprendi*, making it applicable to capital cases. *See Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). We have subsequently considered the effect of *Ring* on Florida's capital sentencing scheme in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 123 S. Ct. 662, 154 L. Ed. 2d 564 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 123 S. Ct. 657, 154 L. Ed. 2d 556 (2002). In *Bottoson* and *King*, we discussed the application of *Ring* and *Apprendi* to Florida's capital sentencing scheme, and rejected the constitutional challenge, as we do here. We also note that Wright was found guilty by the same jury of burglary and sexual battery beyond a reasonable doubt. Therefore, we deny relief on this claim.

Id. at 877-78 (alteration in original). One member of the court dissented from the denial of Mr. Wright's *Apprendi*/*Ring* claim because "the death sentence in this case was expressly predicated upon factual findings made by the judge alone, a practice directly contrary to the express mandate of *Ring* forbidding sentences based upon circumstances found by the judge alone." *Id.* at 880 (Anstead, C.J., concurring in part and dissenting in part). This Court subsequently denied Mr. Wright's petition for

certiorari review of this issue.[14] *Wright v. Sec'y, Fla. Dep't of Corr.*, 541 U.S. 961 (2004).

On August 5, 2004, Mr. Wright filed a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 premised on new evidence consisting of affidavits from two witnesses containing exculpatory information and the availability of newly discovered evidence due to improvements in DNA technology. (Supp PCR-3. 4-39) The circuit court issued an order summarily denying relief on March 23, 2006 (PCR-3. 310-12), and the Florida Supreme Court thereafter affirmed. *Wright v. State*, 995 So. 2d 324 (Fla. 2008).

On February 6, 2009, Mr. Wright filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, which he subsequently amended. On March 19, 2013, the district court entered an order denying Mr. Wright's amended petition and dismissing the habeas action with prejudice. *Wright v. Sec'y, Fla. Dep't of Corr.*, No. 3:09-cv-99-J-32JBT, 2013 WL

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[14] The pertinent question presented by Mr. Wright's petition for writ of certiorari was:

> When a State requires a finding that an aggravating circumstance is present, a finding that sufficient aggravating circumstances exist to warrant the imposition of a death sentence, and a finding that the mitigating circumstances are insufficient to outweigh the aggravating circumstances, all before a death sentence may be imposed, does the Sixth Amendment guarantee the right to have a jury make any or all of these findings?

See Pet. for Writ of Cert. i, Jan. 8, 2004. Mr. Wright argued that this Court needed to grant the writ to address whether Florida's capital sentencing scheme violated the principles of *Ring v. Arizona* and the Sixth Amendment right to a trial by jury. *See* Pet. for Writ of Cert. 11-20.

1137478, at *1 (M.D. Fla. Mar. 19, 2013). The Eleventh Circuit Court of Appeals affirmed the district court's order, and this Court denied certiorari review. *Wright v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2380 (2015).

While pending in federal court, Mr. Wright also filed a state habeas petition in the Florida Supreme Court alleging that the court's prior rejection of his newly discovered evidence claim in *Wright v. State*, 857 So. 2d 861 (Fla. 2003), was erroneous. On October 13, 2013, the court denied Mr. Wright's petition without explanation. *Wright v. Sec'y, Fla. Dep't of Corr.*, 126 So. 3d 1060 (Fla. 2013) (unpublished table decision).

On January 12, 2016, this Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016), vacated the death sentence in that case, and remanded the matter to the Florida Supreme Court for further consideration.

This Court in *Hurst v. Florida* made clear that the jury must find "each fact necessary to impose a sentence of death," 136 S. Ct. at 619, "any fact that expose[s] the defendant to a greater punishment," *id.* at 621 (alteration in original), "the facts necessary to sentence a defendant to death," *id.*, "the facts behind" the punishment, *id.*, and "the critical findings necessary to impose the death penalty," *id.* at 622.

On remand, the Florida Supreme Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), read the plain language of *Hurst v. Florida* and concluded that because statutorily defined facts were necessary to increase the range of punishment to include death as a sentence, proof of those facts was necessary "to essentially convict

a defendant of capital murder." *Id.* at 53. "Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed." *Id.* at 53 n.7 (citing § 921.141(3), Fla. Stat. (2012)). As a result, those facts were essentially elements of a higher degree of murder. *Id.* at 54 ("[W]e 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."). As such, those facts had to be proven like all other elements of a criminal offense and had to be found by a unanimous jury to have been proven beyond a reasonable doubt. *Id*. at 57 ("[T]he 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."). The court remanded Mr. Hurst's case so that a jury could determine whether the State had proven the necessary facts to authorize a judge to impose a death sentence.

On December 1, 2016, the Florida Supreme Court issued *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). In that case, the three homicides at issue were committed on January 9, 1981—two years before the homicide in Mr. Wright's case. Mr. Johnson's conviction of first-degree murder became final on May 17, 1993, after the Florida Supreme Court affirmed his conviction and sentence of death, and after this Court denied certiorari review. Mr. Johnson's death sentence was subsequently vacated and a new penalty phase ordered in 2010 by the Florida Supreme Court. *Johnson v. State*,

44 So. 3d 51 (Fla. 2010). However, Mr. Johnson's first-degree murder convictions remained intact. On remand, death sentences were again imposed. In Mr. Johnson's direct appeal, the Florida Supreme Court found that *Hurst v. State* governed, vacated his death sentences, and remanded so that a unanimous jury could determine whether the State had proven the statutorily identified facts beyond a reasonable doubt and thus authorize a judge to impose death sentences.

On December 22, 2016, a divided Florida Supreme Court decided that *Hurst v. State* would be applied in cases in which the death sentence was not final before June 24, 2002. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Asay v. St*ate, 210 So. 3d 1 (Fla. 2016).

On January 12, 2017, Mr. Wright filed his second successive Rule 3.851 motion wherein he contended that he was entitled to sentencing relief for a variety of reasons grounded in the Sixth, Eighth, and Fourteenth Amendments in light of this Court's decision in *Hurst v. Florida;* the Florida Supreme Court's subsequent decisions in *Hurst v. State* and *Perry v. State*, 210 So. 3d 630 (Fla. 2016); and the ensuing partial retroactivity jurisprudence stemming from *Asay v. State* and *Mosley v. State*. (PCR-4. 42-113) After the Florida Legislature enacted Chapter 2017-1[15] three months later, Mr. Wright sought permission to amend his pending motion to reflect this development. (PCR-4. 152-61) With the court's authorization, he thereafter filed an

[15] The Florida Legislature enacted Chapter 2017-1 to cure the defect in the state's capital sentencing statute identified by *Perry v. State*, 210 So. 3d at 640, by deleting the provision permitting a 10-2 jury recommendation of death and codifying the unanimity requirement announced in *Hurst v. State*.

amended Rule 3.851 motion on May 16, 2017, and a case management conference was later held in August 2017. (PCR-4. 162-261, 370-460)

Following judicial reassignment in December 2018, Mr. Wright sought leave to file a supplement to his amended motion to address new developments impacting his existing claims, and at a status conference on January 25, 2019, the court granted Mr. Wright's request. (PCR-4. 358-64, 555) Mr. Wright filed the supplement on March 1, 2019, wherein he specifically asserted that the portion of the Florida Supreme Court's ruling in *Hurst v. State* construing § 921.141, Fla. Stat., constituted substantive criminal law that should govern his case in accordance with due process principles. (PCR-4. 558-74) After conducting a second case management conference, the circuit court issued an order on October 8, 2019, summarily denying all of Mr. Wright's claims. (PCR-4. 759-801; Appendix C) The court thereafter denied Mr. Wright's Motion for Rehearing on November 8, 2019. (PCR-4. 698)

On January 23, 2020, the Florida Supreme Court issued its opinion in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), wherein it receded from its conclusion in *Hurst v. State* that the sufficiency of the aggravating circumstances and whether they outweighed any mitigating circumstances were facts that had to be found proven before a death sentence could be imposed. In *Poole*, the Florida Supreme Court announced that it had been "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." *Id.* at 502. In *Poole*, the court ignored the statutory language and this Court's express language in *Hurst v. Florida* and instead

focused on the holding in *Ring v. Arizona* which addressed the constitutionality of the Arizona statute that differed significantly from Florida's. Under Arizona's statute, the only finding necessary to subject a defendant convicted of first-degree murder to a death sentence was the existence of a single aggravating circumstance. *Poole* concluded that because in *Ring* the Sixth Amendment only attached to the finding of one aggravating circumstance, the additional findings mandated by Florida's statute were not subject to the Sixth Amendment right to a jury trial. *Id*. at 501-03; *see Hurst v. State*, 202 So. 3d at 83 (Canady, J., dissenting).

Thus, the Florida Supreme Court in 2016 construed Florida's capital sentence and concluded that the statutorily required findings necessary for the imposition of a death sentence were elements of a higher degree of murder. Then in 2019, that same court held that the statutorily required findings necessary for the imposition of a death sentence were not elements of a higher degree of murder.

On appeal to the Florida Supreme Court, Mr. Wright presented two arguments rooted in the Due Process Clause of the Fourteenth Amendment. First, Mr. Wright asserted that the statutory construction announced in *Hurst v. State* constitutes substantive criminal law because the Florida Supreme Court identified what facts in the state's capital sentencing statute were essentially elements of a greater offense that had to be found by a unanimous jury before death was an authorized punishment. *See Hurst v. State*, 202 So. 3d at 53-54. And, because judicial decisions construing a statute or identifying elements of a criminal offense are substantive law and not procedural rulings subject to retroactivity analyses, the Due Process Clause

requires that the statutory construction set forth in *Hurst v. State* govern the law that existed at the time of the crime for which Mr. Wright was convicted. As his second argument on appeal, Mr. Wright asserted that the Due Process Clause precludes the Florida Supreme Court's decision in *State v. Poole* from retroactively changing Florida's substantive law to his detriment because *Poole* reflects a judicial interpretation of a criminal statute that was both "unexpected and indefensible." *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

On January 7, 2021, the Florida Supreme Court issued its opinion affirming the circuit court's denial of relief. *Wright v. State*, 312 So. 3d 59 (Fla. 2021). At the outset of its analysis, the court summarized what it deemed "[t]he crux of [Mr.] Wright's argument on appeal": "*Hurst v. State* established a new offense—capital first-degree murder—and . . . the jury sentencing determinations described in *Hurst* are 'elements' of that new offense." *Id.* at 60. The court continued that "[f]rom [this] assertion, Wright insists that *Hurst* created a substantive rule of law that dates back to Florida's original capital sentencing statute, thereby requiring Wright's death sentence to be vacated on the ground that certain elements of his crime were never found by a jury." *Id.* In subsequently rejecting Mr. Wright's argument, the court limited its analysis to the following:

> As we explained in *Foster* [*v. State*, 258 So. 3d 1248 (Fla. 2018)], there is no independent crime of "capital first-degree murder"; the crime of first-degree murder is, by definition, a capital crime, and *Hurst v. State* did not change the elements of that crime. *Id.* at 1251-52 (holding that when a jury makes *Hurst* determinations, "it only does so *after* a jury has unanimously convicted the defendant of the capital crime of first-

degree murder").

> Moreover, "[w]e have consistently applied our decision in *Asay* [*v. State*, 210 So. 3d 1 (Fla. 2016)], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)." *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017). Wright echoes other pre-*Ring* defendants who have advanced myriad legal theories that, in the end, turn on pleas for a retroactive application of *Hurst*. But this Court has rejected such arguments, however styled.

Id. (second and third alterations in original). The court explicitly declined to address Mr. Wright's second argument on appeal concerning the Due Process Clause of the Fourteenth Amendment and *State v. Poole* by tersely asserting that "Wright's claims fail even under [the court's] pre-*Poole* jurisprudence on *Hurst* and retroactivity." *Id.*

Mr. Wright timely filed a motion for rehearing on January 22, 2021, wherein he asserted that the Florida Supreme Court "misapprehended [his] argument on appeal, the holding in *Hurst v. State* on which he relied, and the two-step Sixth Amendment analysis required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002)." Appellant's Mot. for Reh'g 2, Jan. 22, 2021. The Florida Supreme Court subsequently denied Mr. Wright's motion for rehearing on March 10, 2021, *Wright v. State*, No. SC19-2123, 2021 WL 914174, at *1 (Fla. Mar. 10, 2021), and published its Mandate on March 31, 2021. In accordance with this Court's directive issued in light of the COVID-19 pandemic that extended the time in which to file any petition for writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower court order denying a petition for rehearing, this petition timely follows.

III. RELEVANT FACTS

Mr. Wright was indicted on a first-degree murder count, a sexual battery count, a burglary count, and a grand theft count. (R. 5) The indictment, which was read to the jury panel by the trial judge, did not identify any aggravating circumstances or statutorily required facts as necessary to render a defendant convicted of first-degree murder eligible for a sentence of death under Florida Statute § 921.141.

At the conclusion of the guilt phase, the jury found Mr. Wright guilty of on all counts. (R. 688)

From the outset and throughout the proceedings, the jurors had been told individually that their responsibility was merely to make a recommendation and advise the court as to the appropriate sentence of life or death. (R. 981-82, 990) In fact, each prospective juror and all of the ultimate jurors repeatedly heard that they were responsible for providing a recommendation, only, and that the judge was the sentencer.

At the penalty phase, the jury was also advised that it was its duty to render to the court an advisory sentence and that the final decision rested with the judge. (R. 2997) Thereafter, an advisory verdict was returned stating whereby the jury "recommended" to the court by a vote of 9-3 that Mr. Wright be sentenced to death. (R. 695, 3008)

The jury did not return a verdict and make the statutorily required findings of fact. *See* § 921.141(3), Fla. Stat. (2012) ("(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are

insufficient mitigating circumstances to outweigh the aggravating circumstances"). Those findings were made by the judge in his written findings that he issued before imposing a death sentence.

REASONS FOR GRANTING THE WRIT

I. CONFUSION ABOUNDS REGARDING WHAT IS THE BOUNDARY BETWEEN SUBSTANTIVE LAW AND RULES OF PROCEDURE WHEN A JUDICIAL DECISION CONSTRUES A STATUTE AND ADDRESSES HOW A CONSTITUTIONAL RULE INTERSECTS, BECAUSE FOR RETROACTIVITY PURPOSES IT VERY MUCH MATTERS WHETHER A JUDICIAL DECISION IS SUBSTANTIVE OR PROCEDURAL. THIS COURT SHOULD GRANT THE WRIT TO ADDRESS WHETHER THE FLORIDA SUPREME COURT'S RULING IN HURST V. STATE WAS ONE OF SUBSTANTIVE LAW BECAUSE IT CONSTRUED A STATUTE OR ONE REGARDING A RULE OF PROCEDURE BECAUSE IT APPLIED A CONSTITUTIONAL RULING BY THIS COURT.

In *Hurst v. State*, the Florida Supreme Court construed Florida Statute § 921.141, and held:

> under Florida law, "The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances." [*Parker v. Dugger*, 498 U.S. 308,] 313, 111 S. Ct. 731 (emphasis added) (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.

Hurst v. State, 202 So. 3d 40, 53 (Fla. 2016). Because the sufficiency of the aggravating circumstances was a statutorily identified fact that had to be found before a death sentence could be imposed, the Florida Supreme Court concluded that the sufficiency of the aggravating circumstances was an element that had to be found unanimously by the jury:

> 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 (emphasis added).

In addition to the express language in the majority opinion holding that the sufficiency of the aggravating circumstances was an element of capital murder, Justice Canady's dissenting opinion stated his disagreement with the majority's holding that the sufficiency of the aggravating circumstances was an element:

> "Elements" are "facts" that the State must prove to the jury. *Ring* made clear and *Hurst v. Florida* reaffirmed that in death cases, the necessary elements include the existence of an aggravating circumstance. But the other determinations made in a death penalty proceeding—whether the aggravation is sufficient to justify a death sentence; whether mitigating circumstances (which are established by the defendant) outweigh the aggravation; whether a death sentence is the appropriate penalty—are not elements to be proven by the State.

Id. at 81-82 (Canady, J., dissenting).

The disagreement between the majority and the dissent in *Hurst v. State* was over whether or not the finding that the aggravating circumstances were sufficient was an element of the greater offense of capital murder. This disagreement at its core was a matter of statutory construction. The statute at issue was § 921.141,[16] which,

[16] For simplicity, unless otherwise indicated, Mr. Wright refers in the present tense to Florida's capital sentencing law as it existed in 1983, when he was sentenced to death.

at the time of Mr. Wright's sentencing, provided:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH –
>
> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence 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.
>
> In each case in which the court imposes the death sentence, **the determination of the court shall be supported by specific written findings of fact** based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.**

§ 921.141(3), Fla. Stat. (emphasis added).

In *Stringer v. Black*, 503 U.S. 222 (1992), this Court was called upon to contrast how capital sentencing schemes used aggravating circumstances. This Court explained:

> In *Lowenfield* [*v. Phelps*, 484 U.S. 231 (1988)], the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury duplicated the elements it already had found in determining there was a first-degree homicide. We rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." **We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase**.

> [Citation]. **We also contrasted the Louisiana scheme with the Georgia and Florida schemes**.
>
> The State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court if an invalid aggravating factor is relied upon. In considering a *Godfrey* claim based on the same factor at issue here, the Mississippi Supreme Court considered decisions of the Florida Supreme Court to be the most appropriate source of guidance.

Stringer, 503 U.S. at 233-34 (second alteration in original) (emphasis added) (citations omitted).

In fact, in *Lowenfield v. Phelps*, 484 U.S. 231, 242 (1988), the Louisiana statute defined first-degree murder as fitting within one of five circumstances in contrast to Florida's provision that first-degree murder is either premeditated or felony-murder. This Court in *Lowenfield* found that the Louisiana capital scheme operated similarly to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: **The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury findings of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.** See also *Zant* [*v. Stephens*, 462 U.S. 862, 876 n.13 (1983)] discussing *Jurek* and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Lowenfield, 484 U.S. 245-47 (second alteration in original) (emphasis added).

The Florida Legislature had decided that it was during the penalty phase that the factual determinations were to be made as to the aggravating circumstances and their sufficiency, as well carrying out the Eighth Amendment narrowing function in conformity with *Zant v. Stephens*:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862 (1983) (footnote omitted). Since premeditation is already an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990).

The majority in *Hurst v. State* concluded that the factual determination that "sufficient aggravating circumstances existed" is the finding of those additional facts that are necessary under the Eighth Amendment requirement that death eligibility be narrowed beyond the traditional definition of first-degree murder. *Zant v. Stephens*, 462 U.S. 862, 878 (1983) ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."). Clearly in Florida, the narrowing of the death-eligible occurs in the sentencing phase. That factual determination—that "sufficient aggravating circumstances exist"—has not been made during the guilt phase of a capital trial.

Section 921.141, Florida Statutes, requires at least two factual determinations to be made before a death sentence may be imposed. First, the existence of at least one aggravating circumstance must be found as a matter of fact. Then, the statute

requires "as to the facts" a finding that "sufficient aggravating circumstances exist" to justify imposition of death. § 921.141(3), Fla. Stat. (emphasis added). If these facts are not found, the statute provides that "the court **shall** impose a sentence of life imprisonment in accordance with [§]775.082." *Id.* (emphasis added). Section 775.082, Florida Statutes, provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death." The Florida Supreme Court has long held that §§ 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *Dixon v. State*, 283 So. 2d 1, 7 (Fla. 1973).

The majority in *Hurst v. State* read the plain language of Florida's death penalty statute as mandating a factual determination that there existed sufficient aggravating circumstances to justify a death sentence. Indeed, the statute described the sufficiency of the aggravating circumstances as a "fact" and required the entry of factual findings regarding the sufficiency of the aggravators.[17]

The Florida Supreme Court clearly struggled in *Hurst v. State* as it tried to determine what was a matter of statutory construction and what was a matter of Fifth and Sixth Amendment jurisprudence under *Ring v. Arizona* and *Hurst v.*

[17] Justice Canady, joined by Justice Polston, dissented from the majority's conclusion that the sufficiency of the aggravators was an element of capital murder. This reflected either a different construction of the statute or a different understanding of this Court's ruling in *Hurst v. Florida.*

Florida. It also struggled with whether its ruling was retroactive. If the *Hurst v. State* rule was procedural, the retroactivity rules are different than if *Hurst v. State* announced substantive law dating back to when the statute was enacted. *Fiore v. White*, 531 U.S. 225 (2001).

Considering that the Florida Supreme Court's construction of § 921.141 in *Hurst v. State* constitutes substantive law, due process demands that the law provided thereby was the law in 1983, when the State arrested and charged Mr. Wright with first-degree murder. In *Hurst v. Florida*, this Court first observed that "Florida law required the judge to hold a separate hearing and **determine whether sufficient aggravating circumstances existed to justify imposing the death penalty**." 136 S. Ct. at 619 (emphasis added). This Court further described what facts had to be found under Florida's statutory scheme before a death sentence could be authorized. Quoting Florida law, this Court stated:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "**the facts** . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are sufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see *Steele,* 921 So. 2d, at 546.

Hurst v. Florida, 136 S. Ct. at 622 (third and fourth alterations in original) (emphasis in italics in original) (all other emphasis added). Because Florida's statute provided for a judge to find the requisite facts, it stood in violation of the Sixth Amendment pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Hurst v. State*, the Florida Supreme Court, pursuant to *Hurst v. Florida*,

sought to construe the version of Fla. Stat. § 921.141 that was in effect before 2016. *Hurst v. State*, 202 So. 3d 40; *see also* § 921.141, Fla. Stat. (2012). The Florida Supreme Court identified the requisite facts the State needed to demonstrate in order to increase the range of punishment available on a first-degree murder conviction to include a death sentence. *Hurst v. State*, 202 So. 3d at 53. The court explained,

> [T]he 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.

Id. (emphasis in italics in original) (all other emphasis added). The Florida Supreme Court's citation to *Parker v. Dugger*, 498 U.S. 308 (1991), demonstrates that the additional factfinding was the law in Florida in 1983.

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." *Hurst v. State*, 202 So. 3d at 53. The facts were, in essence, elements of a higher degree of murder that the State had to prove 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 addressed in *Hurst v. State* constitutes Florida's substantive law. *Hurst v. State* identified what statutorily identified facts were essentially elements of the greater offense and had to be found by a jury before a death sentence could be imposed. So, 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 Express, 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 § 921.141, Florida Statutes, 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. Wright's case, that date would be February 5, 1983. *See* Savings Clause, Art. X, § 9, Fla. Const. ("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. But nowhere did the Legislature express disagreement with the Florida Supreme Court's determination 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 demonstrates that the Florida Legislature believed that the Florida Supreme Court correctly construed § 921.141 in *Hurst v. State*. *See Fla. Dep't of Children & 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.").

The Florida Supreme Court's ruling in *Hurst v. State* construed the capital statute, which had been in effect since before 1991. It likewise construed the requirement that before death could be imposed, a jury first had to find that the State sufficiently established the statutorily identified facts. Undoubtedly, there was reasonable basis for the Florida Supreme Court's construction of § 921.141, Florida Statutes, in *Hurst v. State* and its conclusion that whether the aggravators were

sufficient constituted a question of fact. 202 So. 3d at 68; *see also Jackson v. State*, 213 So. 3d 754, 783 (Fla. 2017) ("Those facts that permit the authorization of a death sentence are a matter of state law."). Moreover, the Florida Supreme Court has the final word upon the governing construction of a Florida statute.

Under *Fiore v. White*, 531 U.S. at 228–29, 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) (discussing how 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 at the time the offense occurred in the instant case, February 5, 1983. *See, e.g.*, *Fiore*, 531 U.S. 225 (illustrating that a state court's construction of the state's statutory law is binding even on the Supreme Court of the United States).

The Florida Supreme Court applied *Hurst v. State* retroactively in cases in which the death sentence was not final on June 24, 2002. The date of the homicide was rendered irrelevant, as was the date that the conviction of first-degree murder became final. Death sentences were vacated on the basis of *Hurst v. State* and resentencings ordered in cases in which the homicides occurred in 1981, while in cases in which the homicides occurred many years later *Hurst v. State* was not applied. *Compare Card v. Jones*, 219 So. 3d 47 (Fla. 2017) (resentencing ordered in a

case in which the homicide was committed in 1981), *with Zakrzewski v. Jones*, 221 So. 3d 1159 (Fla. 2017) (finding *Hurst v. State* inapplicable in a case in which the homicides occurred in 1994). If *Hurst v. State* constituted substantive law and identified the elements necessary for a defendant to be convicted, not just of first-degree murder, but of capital first-degree murder, it would seem that it should be applied uniformly based upon the date that the homicide was committed.

Moreover, the Florida Supreme Court continues to struggle. In *State v. Poole*, the court announced it was receding from *Hurst v. State*. 297 So. 3d at 502-03 ("[O]ur 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."). In doing so, the court rejected the *Hurst* majority's reading of § 921.141 and adopted the position taken by Justice Canady's dissent. *Poole* rejected the construction of § 921.141 that had been adopted in *Hurst v. State*. However, the decision in *Poole* cannot be given retroactive effect because to do so would violate the Due Process Clause.[18]

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. There is no meaningful

[18] While the Florida Supreme Court declined to address the *Poole* issue in Mr. Wright's case, it has relied upon *Poole* in other similar cases to deny the same issues as those raised by Mr. Wright, which provides capital defendants in Florida no clarity as to which rules apply to their cases and adds further arbitrariness to Florida's capital scheme. *See Archer v. State*, 293 So. 3d 455 (Fla. 2020) (relying on *Poole* to reject defendant's *Hurst* issues); *Reed v. State*, 297 So. 3d 1291 (Fla. 2020) (finding *Poole* dispositive of *Hurst* issues).

difference between Mr. Wright'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)).

II. THIS COURT SHOULD ADDRESS WHETHER THE EIGHTH AMENDMENT REQUIRES A JURY TO MAKE THE DECISION WHETHER TO IMPOSE A DEATH SENTENCE.

The Eighth Amendment ensures that the death penalty is reliably imposed on only the most morally culpable subset of those persons who commit the most serious homicides. *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Yet, by permitting non-unanimous jury verdicts in some capital cases, Florida's position is inconsistent with "the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination [of] whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987).

Only Alabama and Florida cling to contrary positions, which are at odds with both contemporary standards of decency and the overwhelming consensus of American jurisdictions. Nearly every other jurisdiction has concluded that jury unanimity reflects the vital role of the jury as the conscience of the community and recognizes that such a requirement is deeply rooted in common law and must be required in capital cases.

Capital sentencing procedures that are inconsistent with the "evolving standards of decency that mark the progress of a maturing society," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), violate the Eighth Amendment, *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325 (1976), as do capital sentencing schemes that are inconsistent with the consensus of contemporary practice in the nation. *Beck v. Alabama*, 447 U.S. 625, 635 (1980). These considerations demonstrate that the Eighth Amendment's evolving standards should now require a unanimous jury determination in favor of death before a state may impose such a sentence. *See* § 921.141(2), Fla. Stat. (The Florida Legislature adopted unanimity herein); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (holding that the Sixth Amendment right to jury trial, by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense).

At the very least, the Eighth Amendment should require that a jury make the ultimate decision to impose a death sentence, whether unanimously or not. *See, e.g.*, *Harris v. Alabama*, 513 U.S. 504, 515-26 (1995) (Stevens, J., dissenting); *Ring*, 536 U.S. at 615-18 (Breyer, J., concurring). Those considerations are even more important today. *See, e.g.*, *Reynolds v. Florida*, 139 S. Ct. 27, 28-29 (2018) (Breyer, J., statement respecting denial of certiorari) (In light of the Florida Supreme Court's refusal to apply *Hurst v. State* retroactively to capital defendants whose sentences were final before the decision in *Ring*, the death penalty as administered in Florida (at the time of *Reynolds*) raises Eighth Amendment issues, especially regarding Florida's disinclination to have a jury make the ultimate decision to sentence a defendant to

death).

"[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring); *see also id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."). That is, the death penalty may not be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (same). "Death is indeed different. When the government metes out the ultimate sanction, it must do so narrowly and in response to the most aggravated and least mitigated of murders." *Poole*, 297 So. 3d at 515 (Labarga, J., dissenting).

This Court should grant review in order to determine whether the Florida Supreme Court's zig- zag in its construction of § 921.141(3) violates the Eighth Amendment.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari to review the Florida Supreme Court's decision affirming the circuit court's denial postconviction relief.

Respectfully submitted,

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