No. 21-5356

OCTOBER TERM 2021

IN THE SUPREME COURT OF THE UNITED STATES

JOEL DALE WRIGHT,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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*Mary Elizabeth Wells**
Fla. Bar No. 0866067
Law Office of M.E. Wells LLC
623 Grant Street, SE
Atlanta, GA 30312
Tel. (404) 408-2180
mewells27@comcast.net
**Counsel of Record*

Courtney M. Hammer
Fla. Bar No. 1011328
Capital Collateral Regional Counsel
110 SE 6th Street, Suite 601
Fort Lauderdale, FL 33301
Tel. (954) 713-1284
hammerC@ccsr.state.fl.us

COUNSEL FOR PETITIONER

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REPLY TO THE BRIEF IN OPPOSITION AND RESPONDENT'S ASSERTED REASONS FOR DENYING THE WRIT

Petitioner, Joel Dale Wright, files his reply to Respondent's Brief in Opposition to his Petition for Writ of Certiorari to the Supreme Court of Florida under Rule 15.6 of this Court's rules. The Brief in Opposition (BIO) ignores the questions presented by Mr. Wright and poses entirely different questions than the ones raised in the Petition. Rather than address the questions presented by Mr. Wright directly, the BIO obfuscates the issues and poses two questions that are not the ones set forth in the Petition. Wherefore, the BIO's questions presented should not be considered according to the rules of this Court and Mr. Wright will address the properly raised questions presented in this Reply.

I. The Brief in Opposition fails to recognize that the first question set out in the Petition concerns the Due Process Clause of the Fourteenth Amendment and its requirement that the State prove each element of the criminal offense beyond a reasonable doubt.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a statute was challenged on two grounds: (1) it denied the defendant his Sixth Amendment right to a jury trial on all the elements of the charged criminal offense; and (2) it violated the Due Process Clause of the Fourteenth Amendment because it relieved the State of its burden to prove each element of a criminal offense beyond a reasonable doubt. The Due Process Clause challenge was based upon this Court's decision in *In re Winship*, 397 U.S. 358, 364 (1970), which "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *See Jackson v. Virginia*,

443 U.S. 307, 315 (1979) ("The standard of proof beyond a reasonable doubt . . . 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." (quoting *Winship*, 397 U.S. at 363)).

Apprendi noted that both of the constitutional provisions at issue were activated as to the elements of a criminal offense but not as to the matters that were sentencing factors. *Apprendi* developed a test for distinguishing an element from a sentencing factor:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6.

530 U.S. at 476-77.

Petitioner's first question presented concerns the Due Process Clause and whether the Florida Supreme Court's ruling properly protected and honored his rights guaranteed by the Due Process Clause under *In re Winship* and its progeny. *See Jackson v. Virginia*, 443 U.S. at 333 (Stevens, J., concurring in judgment) ("[T]he reasonable-doubt standard has the desirable effect of significantly reducing the risk of an inaccurate factfinding and thus of erroneous convictions, as well as instilling confidence in the criminal justice system." (citing *Winship*, 397 U.S. at 363-64)).

II. Respondent erroneously assumes that the issues raised in the Petition only concern the Sixth Amendment right to a jury trial.

Respondent asserts that all the findings of fact that were statutorily required

to increase the severity of the authorized punishment—which were later recognized in *Hurst v. State* as elements—were found by the trial judge before he imposed Mr. Wright's death sentence. (BIO at 16) Based on that, Respondent contends that *Hurst v. State* did not change or alter Florida's substantive law and that the findings were already made, just by a judge, not by a jury. (BIO at 16-17) By doing so, Respondent seemingly fails to understand that the State was not required to prove the statutorily identified facts beyond a reasonable doubt as *Winship* required for all elements of a criminal offense. *See Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) ("[T]he due process requirement, as defined in *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970), [is] that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.").

The BIO ignores the fact that if the statutorily identified facts are elements of a greater offense, they must be proven by the State like any other element of a criminal offense, beyond a reasonable doubt. If they are elements, they go to the defendant's guilt of the greater criminal offense. The beyond a reasonable doubt burden was first recognized in *Winship* and *Mullaney* as required by the Due Process Clause. Because proof beyond a reasonable doubt has been viewed as significantly reducing the risk of inaccurate factfinding and erroneous convictions, *Winship* and *Mullaney* were held to be fully retroactive. *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) ("Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is

thus to be given complete retroactive effect."); *Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977) ("In *Mullaney*, as in *Winship*, the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'").

In Mr. Wright's case, Respondent acknowledges that the statute did not permit imposition of a death sentence based only on the verdict finding Mr. Wright guilty of first-degree murder. Rather, the judge was required to find additional facts before he could impose a death sentence, and if the findings were not reduced to writing within thirty days of the judgment, a life sentence was required. Because the additional facts that the judge had to find were not viewed as determinative of the defendant's guilt of capital murder prior to *Hurst v. State*, the State was not held to the proof beyond a reasonable doubt standard. Before issuing *Hurst v. State*, the Florida Supreme Court also did not view those additional facts as subject to the proof beyond a reasonable doubt standard and did not recognize that the sufficiency of the evidence supporting those facts was a matter to be addressed on direct appeal and evaluated under the standard of review dictated by *Winship*. *See Jackson*, 443 U.S. at 318 ("After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.").

III. The Brief in Opposition falsely claims that the "theory" underlying the Petition "turns entirely on state law."

Respondent avows that "Petitioner essentially presents this Court with a

question of state, not federal law." (BIO at 11) This is because, according to Respondent, "defining the elements of a crime is 'essentially a question of state law.'" (BIO at 12)

While the selection of facts that constitute a particular criminal offense is a matter of state law, that does not give a state license to violate the Constitution. The Due Process Clause requires the State to prove beyond a reasonable doubt each element of a criminal offense. Accordingly, whether a fact set out in a statute is an element or a sentencing factor is a matter of federal constitutional law. In fact, that was the federal question at issue in *Apprendi*:

> We did not, however, there budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense and (2) that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment" may raise serious constitutional concern.

530 U.S. at 486 (alterations in original) (citations omitted).

In *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004), this Court addressed *Apprendi* and explained that

> the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment, [1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)], and the judge exceeds his proper authority.

In *Hurst v. State*, the Florida Supreme Court began its analysis by looking to *Apprendi* and *Blakely* for guidance:

> [T]he Supreme Court made clear, as it had in *Apprendi*, that the Sixth Amendment, in conjunction with the Due Process clause, "requires that

> each element of a crime be proved to a jury beyond a reasonable doubt." [*Hurst v. Florida*, 136 S. Ct. 616, 621 (2016)] (citing *Alleyne v. United States*, --- U.S. ---, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013)). The Court reiterated, as it had in *Apprendi*, "that any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to [the] jury." *Id.* (quoting *Apprendi*, 530 U.S. at 494, 120 S. Ct. 2348).

202 So. 3d 40, 51 (Fla. 2016) (second and third alterations in original). As *Apprendi* directs, the Florida Supreme Court examined the plain language of the capital sentencing statute and held:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all **these findings necessary for the jury to essentially convict a defendant of capital murder**—thus allowing imposition of the death penalty—**are also elements** that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge.

Id. at 53-54 (emphasis in italics in original) (all other emphasis added). According to this Court's decision in *Ring v. Arizona*, those additional findings of fact as a matter of federal constitutional law constitute elements of the greater offense. 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). While the identification of the facts that must be shown to authorize a more severe sentence than is otherwise authorized is a matter of state substantive law, whether facts identified as necessary to authorize a more severe

sentence are elements of a greater offense is determinative of a criminal defendant's right to a jury trial under the Sixth Amendment and the right to have the State prove the elements beyond a reasonable doubt under the Due Process Clause. Indeed, the failure to require the State to prove a fact that the state courts determined was necessary to authorize a defendant's incarceration renders the conviction returned and sentenced imposed without proof of the required fact invalid. *See Fiore v. White*, 531 U.S. 225, 228-29 (2001) ("We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." (citing *Jackson*, 443 U.S. at 316; *Winship*, 397 U.S. at 364)).

The same day that *Hurst v. State* issued, the Florida Supreme Court also issued *Perry v. State*, 210 So. 3d 630 (Fla. 2016). There, the court reviewed the revisions to Florida's capital sentencing statute that were enacted on March 17, 2016, shortly after this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The revisions required the jury to make factual findings that previously had been for the judge to make; however, the revised statute allowed the findings to be made by less than a unanimous jury. In *Perry v. State*, the Florida Supreme Court relied upon *Hurst v. State* and held that a less-than-unanimous verdict was unconstitutional in a capital case. Thus, the court explicitly struck down the provision in the revised statute that permitted a death recommendation so long as 10 of the 12 jurors supported it. The court in *Perry v. State* explained that

> **the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt**

> **by a unanimous jury**. *Hurst*, 202 So. 3d at 44-45. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id.* at 53-54, 59-60.

210 So. 3d at 633 (emphasis added).

Following the Florida Supreme Court's decision in *Perry v. State*, Florida's capital sentencing statute was again amended on March 3, 2017, to require the jury to return a unanimous death recommendation before a judge could consider imposing a death sentence.[1] The statute was otherwise unchanged from the version at issue in *Perry v. State*.

Notably, the State of Florida petitioned this Court to grant certiorari review of the ruling in *Hurst v. State*. *See Florida v. Hurst*, 137 S. Ct. 2161 (2017); Petition for Writ of Certiorari, *Florida v. Hurst*, 137 S. Ct. 2161 (2017) (No. 16-998), 2017 WL 656209. The State specifically asked this Court to review whether the Florida Supreme Court decision had misapplied this Court's ruling in *Apprendi*. By doing so, the State affirmatively argued that *Hurst v. State* did not rest on independent state law grounds. Rather, the State argued that the Florida Supreme Court's decision was a misapplication of federal law and thus subject to review by this Court:

> [A] state court decision expressly adjudicating an issue of federal law will evade this Court's review only if that decision "clearly and expressly" indicates that the ruling in question "is alternatively based on bona fide separate, adequate, and independent grounds." *Florida v.*

[1] It is worth noting that in amending the statute, the Florida Legislature expressed no disagreement with the Florida Supreme Court's construction of the capital sentencing statute set forth in *Hurst v. State* or the construction of the amended statute set forth in *Perry v. State*.

> *Powell*, 559 U.S. 50, 57 (2010) (quotation marks omitted). The Florida Supreme Court's dramatic expansion of the constitutional jury-trial right—a ruling that was articulated for the first time on remand from this Court's Sixth Amendment decision, that effectuates a 180-degree reversal of that court's longstanding precedent, and that was announced in a part of its opinion entitled, "EFFECT OF *HURST V. FLORIDA* ON FLORIDA'S CAPITAL SENTENCING," Pet. App. 12a—does not come close to satisfying that demanding standard.

Petition for Writ of Certiorari, *Florida v. Hurst*, 137 S. Ct. 2161 (No. 16-998), 2017 WL 656209, at *17.

Moreover, Respondent's citation to *Rogers v. State*, 285 So. 3d 872 (Fla. 2019), to support its argument as to why this Court should decline review is misguided. (BIO at 12) In *Rogers v. State*, the Florida Supreme Court framed the pertinent issue on direct appeal as follows: "Rogers first argues that the trial court erred in failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances." 285 So. 3d at 885. The trial in *Rogers* began in July 2017, which was after Florida's capital sentencing statute had been revised in the wake of *Hurst v. Florida*.[2] The amended version of the statute was examined by the Florida Supreme Court in *Perry v. State*, and, as noted above, the court held that permitting a death sentence without requiring the jury to make all the necessary factual determinations unanimously was unconstitutional.

Thus, at issue in *Rogers v. State* were the statutorily identified findings set

[2] Section 921.141, Fla. Stat., was amended on March 7, 2016, to require the jury to make the factual findings that the judge was previously required to make in writing before death could be imposed.

forth in the amended statute and discussed in *Perry v. State*. The appellant in *Rogers* argued that the Due Process Clause required that the State bear the burden of proving beyond a reasonable doubt: (1) the existence of the aggravating factors found by the jury; (2) that those aggravating factors found by the jury were sufficient to warrant a death sentence; and (3) that the aggravating factors found by the jury outweighed all of the mitigating factors that were present. In making this argument, the appellant in *Rogers* relied upon not only *Perry v. State*, but also *Winship*, 397 U.S. at 364; *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975); *Apprendi*, 530 U.S. at 494; and *Ring*, 536 U.S. 584.

The opinion in *Rogers* did not disagree with the determination that for a death sentence to be authorized, the jury must: (1) identify the aggravating factors found to exist; (2) find that the aggravating factors found to exist are sufficient; and (3) find that the aggravating factors outweigh all of the mitigating factors that are present. In *Rogers*, the Florida Supreme Court merely held that in *Perry v. State*, it had "mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt." 285 So. 3d at 886. Thus, the court concluded that "these [statutorily required] determinations are not are not subject to the beyond a reasonable doubt standard of proof, and the trial court did not err in instructing the jury." *Id.*

In *Rogers*, the Florida Supreme Court also cited its decision in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), a decision that issued in December 2018 more than 2 years after *Hurst v. State* and 21 months after the Florida Legislature amended the

capital sentencing statute to comport with *Hurst v. State* and *Perry v. State*. The Florida Legislature did not express any concern that those decisions had misconstrued the statutorily identified determinations of fact that were required before a death sentence became permissible punishment. Neither *Rogers* nor *Foster* dispute what determinations a jury must make before death is a possible sentence.

However, whether the determinations that the jury must make before a death sentence is permissible are elements under the Due Process Clause is a federal question. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to a jury and found beyond a reasonable doubt."); *Apprendi*, 530 U.S. at 494 ("Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). Before issuing *Rogers* and *Foster*, the Florida Supreme Court explicitly held in *Hurst v. State* 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 they aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

202 So. 3d at 53-54.

While the Florida Supreme Court has receded from *Hurst v. State* and *Perry v. State*, the statutorily identified findings that must be made before a sentence can be

imposed remain unchanged. Therefore, contrary to Respondent's contention, the state law is clear that: (1) one or more aggravating factors must be found; (2) the aggravating factors found must be sufficient to warrant a death sentence; and (3) the aggravating factors found must outweigh all of the mitigating circumstances that are present. The rulings relied upon in *Wright v. State*, 312 So. 3d 29 (Fla. 2021), concern the federal question of whether the requirement that the jury find the aggravating factors sufficient and that they outweigh all the mitigating factors are elements for Due Process Clause purposes.

IV. The Brief in Opposition erroneously asserts that the Florida Supreme Court's decision in *State v. Poole* receding from *Hurst v. State* precludes consideration of Mr. Wright's petition. To the contrary, the ruling in *Poole* demonstrates a split within the Florida Supreme Court as to how to apply *Apprendi*.

In *State v. Poole*, 297 So. 3d 487, 501 (Fla. 2020), the Florida Supreme Court decided that it had erred in *Hurst v. State* and was receding from its holding that the statutorily identified facts that the judge was required to find before he could impose a valid death sentence were elements of a higher degree of murder. *Poole* did not dispute that the statute did not permit a death sentence solely on the basis of the jury verdict convicting the defendant of first-degree murder. *Poole* recognized that the statute required the judge to:

> set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> > (a) That sufficient aggravating circumstances exit as enumerated in subsection (5), and
> >
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

§ 921.141(3), Fla. Stat. The statute further provided that if the judge's findings were not made and reduced to writing within 30 days of the rendition of the judgment and sentence, a life sentence was mandated.

The *Poole* court recognized that *Apprendi* provided the test for determining whether the statutorily identified facts that the judge was required to find for a death sentence to be authorized are elements of a higher degree of murder; but, it was in the *Hurst* application of *Apprendi* that *Poole* found error. In its analysis, *Poole* said, "The section 921.141(3)(b) selection finding—'that there are insufficient mitigating circumstances to outweigh the aggravating circumstances'—fails both aspects of the *Apprendi* test." *State v. Poole*, 297 So. 3d at 503.

Hurst v. State and *State v. Poole* show that there is/was a split within the Florida Supreme Court over whether the word "fact" as used in the statute was a "fact" for purposes of *Apprendi*. While at the moment it may seem that the ruling in *Poole* has prevailed, a closer look shows the situation is not so clear. Two months after *Hurst v. State* issued, the Florida Supreme Court determined that *Hurst v. State* was partially retroactive. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Death sentences were overturned on both direct appeal and in collateral proceedings due to *Hurst* error. By the time *Poole* issued about 3 years after *Hurst*, 145 Florida death sentences had been vacated due to the ruling in *Hurst v. State*. When *Poole* issued, resentencings had already occurred in 45 of those cases, resulting in 37 life sentences and 8 death sentences. That left 100 cases pending a resentencing.

On the basis of *Poole*, prosecutors asked the Florida Supreme Court to

reinstate death sentences, arguing that *Hurst v. State*, the basis for vacating them, was found to have been wrongly decided. Though the Florida Supreme Court entertained the prosecutors' petitions, it ruled that it could not undo final rulings that had granted resentencing due to *Hurst* error. *See State v. Okafor*, 306 So. 3d 930 (Fla. 2020); *State v. Jackson*, 206 So. 3d 936 (Fla. 2020). As a result, *State v. Poole* was not applied retroactively. This left *Hurst v. State* as the law of the case in around 100 cases in which resentencing were ordered due to *Hurst* error.

Whether or not there is a split in the circuits, there is a serious split in Florida law. The situation cries out for this Court's resolution of the federal question that separates *Hurst v. State* from *State v. Poole*.

V. Florida's substantive law was altered by the statutory construction announced in *Hurst v. State*, and this statutory construction was applied in cases with homicides committed as far back as 1978.

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

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

have been proven by the State beyond a reasonable doubt.

Individuals convicted of first-degree murders from as far back as 1978 whose convictions were final long ago but whose death sentences did not become final until after June 24, 2002, had their death sentences vacated under *Hurst v. State*. The Florida Supreme Court has haphazardly applied *Hurst v. State* in a retroactive fashion to some but not others. It has even sought to undo *Hurst v. State* and receded from its holding in some cases, but not in others. *See State v. Okafor*, 306 So. 3d 930 (Fla. 2020). The resulting confusion and chaos in Florida's substantive law screams out for certiorari review.

CONCLUSION

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

Respectfully submitted,

/s/ Mary Elizabeth Wells
Mary Elizabeth Wells*
Florida Bar No. 0866067
Counsel for Joel Dale Wright
Law Office of M.E. Wells LLC
623 Grant Street, SE
Atlanta, GA 30312
Tel. (404) 408-2180
mewells27@comcast.net

Courtney M. Hammer
Florida Bar No. 1011328
Capital Collateral Regional Counsel
110 SE 6th Street, Suite 701
Fort Lauderdale, FL 33301
Tel. (954) 713-1284
hammerC@ccsr.state.fl.us
* Counsel of Record