DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

EDWARD J. ZAKRZEWSKI, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED--CAPITAL CASE

Context

In *Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016), the Florida Supreme Court held:

> **[A]ll the findings necessary for imposition of a death sentence are "elements"** that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient** to impose death, **unanimously find that the aggravating factors outweigh** the mitigating circumstances, and **unanimously recommend a sentence of death.** We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

(Emphasis added). Chapter 2017-1, Laws of Florida, was enacted on March 13, 2017. It revised § 921.141, F.S. by confirming and incorporating *Hurst v. State* and its construction of the statute and the elements necessary for the range of punishment to include death. *Foster v. State*, 258 So.3d 1248, 1251 (Fla. 2018) ("section 921.141, Florida Statutes, which was revised to incorporate the *Hurst* requirements; and chapter 2017-1, Laws of Florida, which amended section 921.141 to require that a jury's recommendation of death be unanimous.").

At the time of the decision in *Hurst v. State*, Article X, section 9 of the Florida Constitution provided: "**Repeal of criminal statutes.**—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime

previously committed." The Florida Supreme Court has explained that "the purpose of the 'Savings Clause' [wa]s to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime." *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015).

The homicide at issue in *Hurst v. State* occurred on May 2, 1998. When the Florida Supreme Court identified the elements of what the State had to prove before the range of punishment included death, it was determining what the state of Florida's criminal law was on May 2, 1998, the date of the homicide for which Mr. Hurst was being prosecuted.[1]

The Florida Supreme Court's reading of the statute in *Hurst v. State* was different from how the statute had been previously understood. It changed the facts or elements that were necessary for a death sentence to be authorized. The Florida Supreme Court had previously regarded the existence of one aggravating factor as all that was necessary to authorize the imposition of death. *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005) ("Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists."). *See also Ault v. State*, 53 So. 3d 175,

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[1]Identifying the elements of a criminal offense or the facts to be proven beyond a reasonable doubt before a particular sentence is authorized is a matter of Florida substantive law and a legislative function under the separation of powers provision in the Florida Constitution. *See* § 921.002 (1) ("The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature."); *Smith v. State*, 537 So. 2d 982, 986 (Fla. 1989).

206 (Fla. 2010) ("Under Florida law, in order to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute.").

Subsequently in *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017), the Florida Supreme Court vacated a death sentence on the basis of *Hurst v. State* because all of the facts or elements necessary to essential convict the defendant of highest degree of murder and authorize a death sentence had not been found proven beyond a reasonable doubt by a unanimous jury at a 1999 resentencing. The homicide at issue in *Card* occurred in June of 1981, and the conviction of first degree murder was final in 1984. *Card v. State*, 453 So. 2d 17, 18 (Fla. 1984).[2]

The homicides in Petitioner's case occurred on June 9, 1994. His convictions and death sentences become final on January 25, 1999, when this Court denied his petition for a writ of certiorari. *See Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998), *cert denied*, 525 U.S. 1126 (1999). After Mr. Zakrzewski sought collateral relief on the basis of *Hurst v. State*, the

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[2]In addition to *Card v. Jones*, the Florida Supreme Court applied the statutory construction announced in *Hurst v. State*, vacated death sentences, and ordered new "penalty phases" in cases in which the homicides occurred before the homicides in Petitioner's case. In *Anderson v. State*, 220 So. 3d 1133,1152 (Fla. 2017), a death sentence was vacated and a new "penalty phase" ordered on the basis of *Hurst v. State;* the murder at issued occurred on January 14, 1994, murder. *Anderson v. State*, 841 So. 2d 390, 394 (Fla. 2003). In *Johnson v. State*, 205 So. 3d 1285, 1287 (Fla. 2016), three death sentences were vacated and a new "penalty pjase" was ordered on the basis of *Hurst v. State;* the three homicides at issued occurred on January 9, 1981.

Florida Supreme Court ruled that because his death sentence was final prior to June 24, 2002, he was not entitled to the benefit of *Hurst v. State*. It left his three death sentences in place.[3]

The Unresolved Questions

1. Whether the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review, and if so when?[4]

2. When a judicial decision provides a new interpretation of a controlling criminal statute to require additional facts or elements to be proven by the State beyond a reasonable doubt before a judge may consider imposing a death sentence, is it a ruling setting forth substantive law or one adopting a rule of procedure?

3. Whether Petitioner was denied his rights under the Due Process Clause or the Eighth Amendment when: 1) the Florida Supreme Court in his case refused to apply its recent construction of § 921.141, F.S., that before death was an

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[3]Mr. Zakrzewski had pled guilty to the three charges without a plea agreement. At the penalty phase, the jury returned two advisory death recommendations by votes of 7 to 5, and one advisory life recommendation by a vote of 6 to 6.

[4]This is the same question that this Court found worthy of certiorari review in *Fiore v. White*, 531 U.S. 225, 226 (2001) ("We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review."). However, this question was not resolved in *Fiore* due to this Court's conclusion that there had not been a new interpretation of a criminal statute, merely the definitive decision of the criminal statute's plain meaning. *Id.* at 228 ("the interpretation of § 6018.401(a) set out in Scarpone "merely clarified" the statute and was the law of Pennsylvania-as properly interpreted-at the time of Fiore's conviction.").

available sentence the State had to prove beyond a reasonable doubt, not just one aggravating circumstance, but also that the aggravating circumstances found were sufficient and that they outweighed the mitigating circumstances, and 2) the Florida Supreme Court applied the recent construction of § 921.141 in homicide prosecutions in which the homicides at issue were committed as many as 13 years before those in Petitioner's case?

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Petitioner, **EDWARD J. ZAKRZEWSKI, JR.**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court issued on September 20, 2018.

CITATION TO OPINION BELOW

The Florida Supreme Court's opinion appears at *Zakrzewski v. State*, 254 So. 3d 324 (Fla. 2018). The opinion is attached to this Petition as Attachment A.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court entered its opinion on September 20, 2018.

Mr. Zakrzewski filed an application for an extension of his time to file this petition for a writ of certiorari. On December 20, 2018, Justice Thomas granted the application and extended the time for filing this petition until Sunday, February 17, 2018. The extension of time is attached as Attachment B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States 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

On November 19, 1994, Zakrzewski was indicted in Okaloosa County, Florida for the first degree murder of his Korean wife and two children which had occurred on June 9, 1994 (R. 15-16). After the murders, Petitioner left Florida and went to Hawaii where he lived in a religious commune. After a television show in 1995 revealed he was wanted for the murders, Zakrzewski turn

himself in to authorities and was returned to Florida.

On March 9, 1996, Zakrzewski entered guilty pleas to the three first degree murders with which he was charged. He did so without any plea agreement with the State. The State continued to seek the imposition of death sentences.

The penalty phase proceeding began March 25, 1996. The defense presented mitigating evidence establishing that Zakrzewski had been born in 1965 and had joined the Air Force when he was nineteen (T. 975, 980). While stationed in Montana in 1986, he met his wife, Sylvia, who was Korean. When she became pregnant, she told him that she was going to have an abortion unless he married her (T. 982). Zakrzewski agreed to get married. Thereafter, he was transferred to Homestead, Florida, where his son was born, followed by a daughter two years later (T. 984). In 1989, he was transferred to Korea where he was stationed for three years.

While in her native country of Korea, Sylvia felt discrimination because she was married to an American and because she had an American's children. Sylvia's father had once said, "how can you do that? It's like a dog being with a cat. How can a dog speak to a cat? That was how he looked at it." (T. 990). Before their return to the United States, Sylvia informed Zakrzewski that she wanted "to have a one hundred percent Korean baby" (T. 991). Initially, "she talked about artificial insemination and then it turned out that was kind of a bait and switch, if you will, you know. The real deal was she was going to get this guy - - corner this guy and get pregnant." (T. 991). The guy in question was a Korean friend from college (T. 992). When Zakrzewski was sent back

to Eglin in the spring of 1992, he brought his son with him while Sylvia remained in Korea trying to get pregnant with her college friend's baby (T. 993). Sylvia, who did not want to leave Korea (T. 1003), arrived two weeks later and was "real mad" because there was no housing yet available and she and Zakrzewski would have to live in billeting for a couple of weeks (T. 994). To Sylvia's dismay, she was not pregnant.

The talk of divorce that Sylvia commenced before they left Korea escalated when she arrived at Eglin (T. 1004). Marital discord continued at Eglin. Sylvia would repeatedly ask the children who they wanted to live with. When they responded "Daddy", Sylvia would say:

> Daddy? Good. You don't love me, you don't look likeme. You don't love me. I'm going back to Korea.You're never going to see me again. They run to herand say, no, I want to stay with you, I want to staywith you. And then, good, then you're not going to seeyour Dad any more either.

(T. 1013).

In early 1993, "talk of divorce increase[d]" (T. 1006). During the summer of 1993, Sylvia took the children and returned to Korea using Zakrzewski's credit card, increasing the families financial difficulties (T. 1009). Her primary reason for going was to try to get pregnant (T. 1011). Mr. Zakrzewski sank into depression. "I didn't know then what the deal was. I couldn't make her happy no matter what I did." (T. 1011).

Sylvia and the children returned to Eglin in August, 1993. When she got back, she told Mr. Zakrzewski that she was pregnant

with a Korean baby (T. 1010). Shortly after her return, Sylvia accused Zakrzewski of being with someone else because he had charged two meals at Denny's on his credit card (T. 1012). He spent the night in the laundry room. When he returned home from work the next day, "the house was a wreck" and the kids "were hysterical" (T. 1013). Sylvia was having "stomach pains," and Zakrzewski took her to the hospital (T. 1014). Sylvia miscarried. She blamed Zakrzewski "for leaving that night" (T. 1014). The relationship continued to deteriorate. After the miscarriage, "the arguments got more intense and more frequent" (T. 1020). Financial pressures kept growing. Zakrzewski began to contemplate suicide in order to provide the money through his insurance that Sylvia wanted in order to buy a house (T. 1020). Instead at Sylvia's urging, Zakrzewski wrote his mother to "ask her for money" to buy the house (T. 1021). The house was purchased even though Zakrzewski felt that he could not afford it.

Talk of divorce was constant. Sylvia would ask for a divorce that Zakrzewski knew that she in fact would not accept. He explained: "No matter what I did it would come down to I don't love you or you don't love me. That's why you want a divorce and then well, give me a divorce, and then she'd have the kids running back and forth screaming, yelling, no, no, no. I don't want daddy to go." (T. 1023).

Finally, Zakrzewski buckled under the stress and strain of the

seemingly hopeless and never ending situation. After killing his wife, he believed killing the children was an act of mercy. On June 9, 1994, as Zakrzewski simply stated in his testimony, "I killed my family" (T. 1023).

Afterwards, Zakrzewski left and went to Hawaii. There, he ultimately ended up living in a Christian commune on Molokai. It was there that he saw himself on a television show about fugitives from justice. Zakrzewski turned himself in the next day.

Two mental health experts testified for the defense and found that at the time of the homicides, Zakrzewski was under the influence of an extreme emotional disturbance (T. 684, 838). The State's mental health expert, Dr. Harry McClaren, agreed "In my opinion I believe that he was under extreme emotional disturbance at the time" (T. 1150).

The prosecutor brought Nietzsche up during his cross-examination of one of the defense's mental health experts, Dr. James Larson. The prosecutor asked if Larson noted that documents downloaded from Zakrzewski's computer included quotes from "Nietzsche philosophy" (T. 845). The prosecutor then asked, "[d]oesn't Nietzsche have to with - - doesn't he propound a philosophy dealing with the superman?" Dr. Larson responded that he "believed he did." The prosecutor then asked if "interest in that superman-type philosophy" would be consistent with Zakrzewski's narcissistic view of himself (T. 845-46). Dr. Larson responded,

"[i]t would." Later, the prosecutor asked Dr. Larson if "this Nietzsche superman philosophy might have been a factor in how he acted out to solve the problems [Zakrzewski] had?" (T. 849). Larson said that he had considered it, but his conclusion was that at the time of the homicide Zakrzewski was under an extreme emotional disturbance from stress and severe depression (T. 849, 824, 838-39).

Zakrzewski testified in his own behalf. On cross, the prosecutor asked about his interest in reading. Zakrzewski acknowledged reading about "World War II," "Germany," "Vikings," "German philosophy," and "Frederick Nietzsche" (T. 1074-75). When asked if "those writings of Nietzsche fascinate[d]" him, Zakrzewski responded, "no more than any other military type philosopher" (T. 1075). Zakrzewski acknowledged that he "placed some of [Nietzsche's] quotes on [his] computer" (T. 1075). When asked did he read the works of Nietzsche, Zakrzewski responded, "[a]mong other philosophers, I read Nietzsche, yes" (T. 1078). Zakrzewski also testified that quotations from Nietzsche were included in writings that he prepared while in jail (T. 1096). He was asked if Nietzsche was his favorite philosopher (T. 1097). Zakrzewski responded, "He's one I've read. My favorite? No, he's not my favorite" (T. 1097). He was then asked, "[i]n his writings what is the superman?" (T. 1097). He replied, "It's sort of subjective." When asked whether Nietzsche's superman was

Nietzsche's "ideal man," Zakrzewski answered, "[y]eah, it's what his ideal is. I'm not sure exactly what his ideal is." He then indicated that it was not his own ideal (T. 1097). At that point, the prosecutor's asked Zakrzewski if "Nietzsche denounced Christianity in his writings." The trial court sustained the defense counsel's objection (T. 1097-98).

Despite sustaining the objection to the question put forth to Zakrzewski regarding whether Nietzsche was anti-Christian, the State was inexplicably allowed to pursue the matter with its witness in rebuttal, Dr. McClaren. When called in the State's rebuttal, Dr. McClaren did opine that Zakrzewski was under the influence of an extreme emotional disturbance at the time of the murders (T. 1150). Dr. McClaren was then asked if he had "considered Zakrzewski's apparent preoccupation with the philosophy of Frederick Nietzsche." (T. 1156). The prosecutor then asked: "after learning of [Zakrzewski's] preoccupation with Nietzsche, have you familiarized yourself with the basic tenets of his familiarity with Nietzsche." (T. 1156)). Dr. McClaren responded that he had read encyclopedias about Nietzsche, and then some of Nietzsche's writings. The prosecutor then asked, "what is Nietzsche philosophy towards Christianity." Dr. McClaren responded, "He vigorously attacked Christianity." (T. 1157).

In his closing argument, the prosecutor conceded that a statutory mitigating circumstance had been established the

defense, "that the crime was committed while he was under the influence of extreme mental or emotional disturbance." (T. 1215). This was because Dr. McClaren had agreed with the two defense experts that Zakrzewski "was extremely disturbed" at the time of the murders (T. 1215). Saying first that Zakrzewski's "disturbance does not excuse what he did" (T. 1216), the prosecutor then denigrated the value of the statutory mitigating circumstance that he had conceded was present. He sought to label Zakrzewski and his "disturbance" as anti-Christian because Zakrzewski had read Nietzsche who Dr. McClaren had testified was anti-Christian. The prosecutor's closing maintained that since Zakrzewski read Nietzsche and Nietzsche was anti-Christian that meant that Zakrzewski was also anti-Christian despite his claims to the contrary (T. 1216). The prosecutor noted that Zakrzewski had written down a Nietzsche quote while in a jail. He read it to the jury: "Christianity is a primary culprit in propagating the belief that suicide is a ticket to eternal damnation. Ludicrous. All that's required are a couple of I believes and please forgive me. The Bible says it. This doctrine of eternal damnation is but another route of egress for spineless fools." (T. 1223-24).

The prosecutor then argued that the fact that Zakrzewski read Nietzsche should be weighed against him and the mitigating evidence that he had presented: "So, you be sure to weigh his philosophy about Christianity with whether or not he should be

forgiven for appearing to accept Christianity in Hawaii." (T. 1224).[5]

The jury was instruct on three aggravating factors: (1) the defendant was previously convicted of other capital offenses (the contemporaneous murders), (2) the murders were committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification (CCP), and (3) the murders were committed in an especially heinous, atrocious, or cruel manner (HAC). The jury was instructed on two statutory mitigating circumstances: "(1) no significant prior criminal history and (2) the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. Zakrzewski also presented twenty-four nonstatutory mitigators." *Zakrzewski v. State*, 717 So. 2d 488, 491 (Fla. 1998).

The jury was also instructed:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that I will now give you and to render to the Court an advisory sentence as to each of the three counts based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(T. 1259) (emphasis added).

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[5]This argument rested upon Dr. McClaren's rebuttal testimony that before testifying he read up on Nietzsche and had learned that Nietzsche vigorously attacked Christianity.

The jury was instructed that the aggravating factors had to be proven by the State beyond a reasonable doubt. The jury was not instructed that the aggravating factors had to be proven to be "sufficient" beyond a reasonable doubt, nor that the State had to prove that the aggravating factors outweighed the mitigating circumstances beyond a reason doubt (as is now required under *Hurst v. State*).

The advisory jury returned two advisory death recommendations for the murder of Mr. Zakrzewski's wife and his seven year old son by a votes of 7 to 5, and one advisory life recommendation for the murder of his five year old daughter by a vote of 6 to 6. The jury's verdicts did not reflect what, if any, findings had been made by the jurors.

The sentencing judge overrode the one life recommendation and imposed three death sentences (R. 298-304).

On direct appeal, Zakrzewski argued that: (1) the trial court erred in finding HAC; (2) the trial court erred in finding CCP; (3) the death sentence was not proportionately warranted; (4) the trial court erred in overriding the life recommendation as to the 5-year old daughter; (5) prejudicial photographs of the victims were erroneously admitted; (6) the trial court erred in permitting the State's mental health expert to testify about Nietzsche and his views on Christianity; (7) the trial court erred in permitting the State's mental health expert to provide

testimony that did not rebut Zakrzewski's mental health expert; (8) the trial court erred in not instructing the jury as to the substantially impairment mitigator; and (9) the trial court erred in failing to instruct the jury on each of Zakrzewski's nonstatutory mitigators.

The Florida Supreme Court affirmed the death sentences with three justices dissenting.[6] *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998), rehearing denied September 9, 1998. A petition for writ of certiorari was denied on January 25, 1999. *Zakrzewski v. Florida*, 525 U.S. 1126 (1999).

Zakrzewski sought collateral relief (PCR. 3-6). In those proceedings, Zakrzewski argued that his death sentences stood in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court denied relief (PCR. 576-84).

Zakrzewski's appeal from the circuit court was denied. In rejecting Zakrzewski's *Apprendi* claim on the merits, the Florida Supreme Court reasoned: "the prior violent felony or capital felony conviction aggravator exempts this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty." *Zakrzewski v. State*, 866 So. 2d 688, 697 (Fla. 2003).

In May of 2007, Zakrzewski filed a second motion for post

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[6]The Florida Supreme Court did find the trial court erred in finding HAC established as to Zakrzewski's wife. However a majority of this Court found the error to be harmless.

conviction relief. He challenged Florida's lethal injection protocol after the Angel Diaz execution. After the circuit court denied relief, Zakrzewski unsuccessfully appealed to the Florida Supreme Court. *Zakrzewski v. State*, 13 So. 3d 1057 (Fla. 2009).

On November 29, 2010, Zakrzewski filed a third collateral motion. It was based on the decision in *Porter v. McCollum*, 558 U.S. 30 (2009). After the circuit court denied the motion (3PC-R. 257), Zakrzewski unsuccessfully appealed to the Florida Supreme Court (3PC-R. 354). *Zakrzewski v. State*, 115 So. 3d 1004 (Fla. 2012).

On March 19, 2013, Zakrzewski filed another collateral motion. It was premised upon newly discovered evidence. It was summarily denied by the circuit court. Zakrzewski unsuccessful appealed to the Florida Supreme Court. *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014) (Table).

On May 2, 2016, Zakrzewski filed a habeas petition in the Florida Supreme Court. It was based on the Sixth Amendment ruling in *Hurst v. Florida*, 136 S.Ct. 616 (2016). However, the Florida Supreme Court had held that *Hurst v. Florida* was not retroactive to death sentences final before June 24, 2002. The habeas petition was denied. *Zakrzewski v. Jones*, 221 So. 3d 1159 (Fla. 2017).

On January 12, 2017, Zakrzewski filed another collateral motion. In it, he presented several claims arising in the wake of

Hurst v. Florida. However, the claim that matters for this petition was presented when in November 2017, Zakrzewski was allowed to file an amendment and add a fifth claim, a due process claim based upon the statutory construction portion of *Hurst v. State* and the enactment of Chapter 2017-1, Laws of Florida. Under *Hurst v. State,* Florida's substantive law required the elements of the highest degree of murder to be found proven by the State beyond a reasonable doubt by a unanimous jury.

The claim in the amendment also relied upon *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). There Card's death sentence was vacated and his case remanded to give the State the opportunity to prove the elements of capital murder beyond a reasonable doubt to the satisfaction of a unanimous jury. Because *Hurst v. State* and Chapter 2017-1 would govern the new proceeding in a homicide prosecution in which the criminal offense was committed in 1981, Zakrzewski argued that the same substantive criminal law must govern his case and require his death sentence to be vacated and a trial be ordered to determine if the State could prove the elements of the highest degree of murder beyond a reasonable doubt to the satisfaction of a unanimous jury.

A case management hearing was conducted on December 14, 2017. At its conclusion, the presiding judge said that "it bothers this Court that a line is drawn in the sand, as far as the time period goes." (PCR4 235). He indicated that he was

troubled by Zakrzewski's claims and "very well may rule in favor of the defense." (PCR4 236).

On December 24, 2017, Zakrzewski filed a supplemental memorandum of law. Attached to the motion were the jury instructions given in *State v. Silver*, Case No. F09-0889A (11th Jud. Cir. Ct.), a capital homicide prosecution. The *Silver* instructions were given in compliance with Chapter 2017-1. A portion of the *Silver* instructions were quoted in the memo:

> [B]efore a sentence of death may be imposed, the State must prove the following four elements beyond a reasonable doubt:
>
> 1. One or more aggravating factors alleged by the State exist;
>
> 2. The aggravating factor(s) found to exist are sufficient to warrant a sentence of death;
>
> 3. The aggravating factor(s) found to exist outweigh the mitigating circumstances found to exist;
>
> 4. The defendant should be sentenced to death instead of life imprisonment without the possibility of parole.

(PCR4 256).

In his supplemental memo, Zakrzewski identified a number of death row inmates who like Card had their death sentences vacated and new proceedings ordered at which Chapter 2017-1 governed (PCR4 258-60). Zakrzewski attached to the memo death notices and/or transcripts showing the State's compliance with the provisions of Chapter 2017-1. The prosecutors in those case "are

treating the elements of capital first degree murder set forth in § 921.141 as revised as defining the criminal offense of capital first degree murder at the time of the 1981, 1984, 1994, and 1997 homicides at issue" in the various cases cited. (PCR4 260). Zakrzewski then argued:

> If the elements of capital first degree murder were applicable to homicides committed in 1981, 1984, 1994, and 1997, the same substantive law was also applicable to the 1994 homicides for which Mr. Zakrzewski was convicted on three counts of first degree murder. The Due Process Clause required those elements to have been proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363 (1970). Based upon *Winship*, the US Supreme Court held in *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), that a failure to instruct a jury on the "beyond a reasonable doubt" standard was profound or structural error. However, Mr. Zakrzewski's jury was not instructed on the need to find the aggravators sufficient beyond a reasonable doubt, nor was it instructed that it had to find the aggravators outweighed the mitigators beyond a reasonable doubt.

(PCR4 260).

On February 16, 2018, the circuit court denied Zakrzewski's motion and its amendment, including the fifth claim (PCR4 306). Zakrzewski asked for rehearing which was denied on March 26, 2018. Zakrzewski's notice of appeal was filed on April 24, 2018.

After the record arrived, the Florida Supreme Court ordered Zakrzewski to show cause "why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445."

Zakrzewski in his response argued that the decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), did not address

the claim that he had presented based upon the statutory construction set forth in *Hurst v. State* and confirmed in Chapter 2017-1.

Zakrzewski argued that the statutory construction set forth in *Hurst v. State* constitutes Florida substantive criminal law and identifies the elements of the highest degree of murder which must be proven before a death sentence is authorized. There, the Florida Supreme Court 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.

Hurst v. State, 202 So. 3d at 53-54 (emphasis added).

The Due Process Clause as explained in *In re Winship*, 397 U.S. 358 (1970), requires the State to prove the elements of capital murder "beyond a reasonable doubt":

> *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979).[7]

Zakrzewski argued that the *Winship* holding that the Due

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[7]In *Jackson v. Virginia*, the US Supreme Court made clear that the decision in *Winship*, involving a juvenile adjudication, governed all criminal prosecutions of adult defendants.

Process Clause required the State to prove elements of a criminal offense beyond a reasonable doubt was applied in *Fiore v. White*, 531 U.S. 225, 226 (2001). There, the US Supreme Court in federal habeas proceedings overturned a state court conviction on the basis of *Winship* and the Due Process Clause.

Zakrzewski also argued that *Alleyne v. United States*, 570 U.S. 99, 111 (2013). He specifically relied upon the holding there and quoted the following:

> When a finding of fact alters the legally prescribed punishment so as to aggravate it, **the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.** It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Alleyne, 570 U.S. at 114-15 (emphasis added).

Zakrzewski argued that identifying the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *Id.* at 113 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.").

In replying to the arguments made by the State in its responsive pleading, Zakrzewski also relied upon *Bunkley v.*

Florida, 538 U.S. 835 (2003). There, this Court found a violation of the Due Process Clause when the retroactivity analysis set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), was used to deny a collateral litigant the benefit of a judicial decision changing Florida's substantive law set forth the elements of a criminal offense. In *Bunkley v. Florida*, the Florida Supreme Court's *Witt* analysis in *Bunkley v. State*, 833 So. 2d 739 (Fla. 2002), was found wanting:

> It has long been established by this Court that "the **Due Process Clause ... forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.**" [*Fiore*], at 228-229, 121 S.Ct. 712. Because Pennsylvania law-as interpreted by the later State Supreme Court decision-made clear that Fiore's conduct did not violate an element of the statute, his conviction did not satisfy the strictures of the Due Process Clause. Consequently, "retroactivity [was] not at issue." *Id.*, at 226, 121 S.Ct. 712.
>
> *Fiore* controls the result here. As Justice Pariente stated in dissent, "application of the due process principles of *Fiore*" may render a retroactivity analysis "unnecessary." 833 So.2d, at 747. The question here is not just one of retroactivity. Rather, as *Fiore* holds, "retroactivity is not at issue" if the Florida Supreme Court's interpretation of the "common pocketknife" exception in *L.B.* is "a correct statement of the law when [Bunkley's] conviction became final." 531 U.S., at 226, 121 S.Ct. 712. **The proper question under *Fiore* is not whether the law has changed. Rather, *Fiore* requires that the Florida Supreme Court answer whether, in light of *L.B.*, Bunkley's pocketknife of 2 ½ to 3 inches fit within § 790.001(13)'s "common pocketknife" exception at the time his conviction became final.**

Bunkley v. Florida, 538 U.S. at 840 (emphasis added).

The Florida Supreme Court rejected Zakrzewski's appeal

saying:

> After reviewing Zakrzewski's response to the order to show cause, as well as the State's arguments in reply, we conclude that our prior denial of Zakrzewski's petition for a writ of habeas corpus raising similar claims is a procedural bar to the claims at issue in this appeal. All of Zakrzewski's claims depend upon the retroactive application of *Hurst*, to which we have held he is not entitled. *See Zakrzewski v. Jones*, 221 So.3d 1159, 1159 (Fla. 2017); *Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Zakrzewski's motion.

Zakrzewski v. State, 254 So. 3d 324, 324-25 (Fla. 2018).

The Florida Supreme Court did not address Zakrzewski's due process argument that was premised upon the statutory construction in *Hurst v. State* and this Court's decisions in *In re Winship*, *Fiore v. White*, and *Bunkley v. Florida*. It treated Zakrzewski's appeal as raising a claim based upon a procedural ruling, not a change in Florida's substantive criminal law.

The importance of this distinction was recognized in *Schriro v. Summerlin*, 542 U.S. 348 (2004):

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, *see Saffle v.Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him.

Schriro, 542 U.S. at 351-52 (emphasis added) (footnote omitted).

However, the Florida Supreme Court simply refused to acknowledge this distinction and/or recognize that Zakrzewski's claim was a due process claim based upon a change in Florida's substantive criminal law. It simply relied upon its earlier decisions finding that *Hurst v. Florida* did not apply retroactively to death sentences final before June 24, 2002.[8]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO ANSWER THE QUESTION THIS COURT FOUND WORTHY OF CERTIORARI REVIEW IN *FIORE V. WHITE*, BUT WHICH WAS ULTIMATELY NOT ANSWER THERE. IT IS AN IMPORTANT QUESTION THAT HAS ESCAPED RESOLUTION. THE RELATED QUESTION AS TO HOW TO DETERMINE WHETHER A JUDICIAL

---

[8]Recently, the Florida Supreme Court seemed to acknowledge that a *Fiore/winship* claim was different and not governed by its *Witt* jurisprudence in *Foster v. State*, 258 So.3d 1248 (Fla. 2018). There, the relied upon statutory labels to ignore function:

> These statutes and the rule of procedure illustrate that the *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred. Thus, Foster's jury did find all of the elements necessary to convict him of the capital felony of first-degree murder—during the guilt phase.

This analysis does not comport with *Alleyne*, nor with Justice Scalia's observation in *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives— *whether the statute calls them elements of the offense, sentencing factors, or Mary Jane* —must be found by the jury beyond a reasonable doubt.") (emphasis added).

DECISION IS PROCEDURAL OR SUBSTANTIVE WHEN IT ADOPTS A NEW STATUTORY CONSTRUCTION OF A CRIMINAL STATUTE IN ORDER TO FIND IT CONSTITUTIONAL.

This Court has been inundated with petitions for writs of certiorari to the Florida Supreme Court in capital collateral cases due to the significant change in Florida law that resulted after this Court issued *Hurst v. Florida*. Most of the petitions that this Court has seen ask this Court to review the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida*, itself.

In all the hubbub, litigants have failed to sort through the seismic shift in Florida law that followed this Court's decision in *Hurst v. Florida*. Unlike what happened in Arizona after this Court issued *Ring v. Arizona*, the Florida Supreme Court adopted a new construction of Florida's capital sentencing statute. It held for the first time that the facts appearing in the statute which a judge was to find when imposing a death sentence were in essence elements of a higher degree of murder and would henceforth have to be proven by beyond a reasonable doubt to the satisfaction of an unanimous jury. *Hurst v. State*, 202 So. 3d at 53 ("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.").

Because Florida law required elements of a criminal offense to be found proven by a unanimous jury, a unanimous jury verdict was required. *Id.* at 54 ("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.").

The Florida Supreme Court acknowledge it had not previously recognize these facts as elements. *Asay v. State*, 210 So. 3d 1, 15-16 (Fla. 2016) (noting it had not previously "treat[ed] the aggravators, the sufficiency of the aggravating circumstances, or the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime."). In Florida, the elements of capital murder changed. The Florida Supreme Court had regarded the existence one aggravating factors as all that was necessary to authorize the imposition of death.

Because of the focus on *Hurst v. Florida* and the Florida Supreme Court's retroactivity ruling, an examination of the new interpretation of what facts have to be proven before the range of punishment includes death as a possible sentence.

The overlooked reality is that the decision in *Hurst v.*

State announced a new interpretation of state criminal statute. The question that this Court found worthy of certiorari review is presented here. *Fiore v. White*, 531 U.S. at 226 ("We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.").

The validity of the Florida Supreme Court's reliance upon its retroactivity analysis from *Witt v. State* to deny collateral relief to those whose death sentences were final before June 24, 2002, can only be sustain if a judicial decision announcing a new interpretation of a state's criminal statute is not one substantive law, but one that is procedural in nature. This Court should grant certiorari review to consider and address what the Due Process Clause requires in deciding if the new judicial decision is one that is substantive in nature, and if so, when is a state required to apply the new substantive law to those seeking to collaterally benefit.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition

has been furnished by electronic service to Charmaine M. Millsaps, Office of the Attorney General, The Capitol, PL-1, Tallahassee, FL 32399, on this 19th of February, 2019.

/s/ Martin J. McClain
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Counsel for Mr. Zakrzewski

Attachment A

254 So.3d 324
Supreme Court of Florida.

Edward J. ZAKRZEWSKI, II, Appellant,
v.
STATE of Florida, Appellee.

No. SC18-646
|
September 20, 2018

Synopsis

Background: Following conviction and denial of petition for writ of habeas corpus, defendant filed motion for postconviction relief. The Circuit Court, Okaloosa County, John T. Brown, J., denied motion. Defendant appealed.

[Holding:] The Supreme Court held that defendant was procedurally barred from raising claims previously addressed on denial of habeas corpus.

Affirmed.

Pariente, J., concurred in result and filed opinion.

West Headnotes (1)

[1] Criminal Law
Matters Already Adjudicated

Supreme Court's prior denial of defendant's petition for a writ of habeas corpus raising similar claims was a procedural bar to the claims at issue in appeal from denial of motion for postconviction relief; all defendant's claims depended upon the retroactive application of *Hurst v. State*, 202 So.3d 40, to which the Supreme Court had held he was not entitled.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Okaloosa County, John T. Brown, Judge - Case No. 461994CF001283XXXAXX

Attorneys and Law Firms

Martin J. McClain of McClain & McDermott, P.A., Wilton Manors, Florida, for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Senior Assistant Attorney General, Tallahassee, Florida, for Appellee

Opinion

PER CURIAM.

We have for review Edward J. Zakrzewski's appeal of the circuit court's order denying Zakrzewski's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

Zakrzewski's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). Zakrzewski responded to this Court's order to show cause arguing why *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), should not be dispositive in this case.

After reviewing Zakrzewski's response to the order to show cause, as well as the State's arguments in reply, we conclude that our prior denial of Zakrzewski's petition for a writ of habeas corpus raising similar claims is a procedural bar to the claims at issue in this appeal. All of Zakrzewski's claims depend upon the retroactive application of *Hurst*, to which we have held he is not entitled. *See Zakrzewski v. Jones*, 221 So.3d 1159, 1159 (Fla. 2017); ***325** *Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Zakrzewski's motion.

The Court having carefully considered all arguments raised by Zakrzewski, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

CANADY, C.J., and LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

PARIENTE, J., concurring in result.

I agree with the per curiam opinion that we have formerly denied Zakrzewski relief pursuant to *Hitchcock*,[1] which, of course, is now final. However, I write separately to emphasize the jury override in Zakrzewski's case.

1 *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017).

Following the penalty phase, the jury in Zakrzewski's case recommended two sentences of death—both by a vote of seven to five—and one sentence of life by a vote of six to six. Nevertheless, the trial court sentenced Zakrzewski to three sentences of death, thereby overriding the jury's recommendation for life on the final sentence. *See Asay v. State* (*Asay V*), 210 So. 3d 1, 29 n.19 (Fla. 2016), *cert. denied*, —— U.S. ——, 138 S.Ct. 41, 198 L.Ed.2d 769 (2017) (Labarga, C.J., concurring); *id.* at 35 n.32 (Pariente, J., concurring in part and dissenting in part).

As I expressed in *Asay V*, "the jurisprudence on the acceptability of judicial overrides has so dramatically changed" since sentences like Zakrzewski's were finalized. *Id.* at 35 n.32 (Pariente, J., concurring in part and dissenting in part). *Hurst*[2] made clear that jury overrides are unconstitutional, and, likewise, jury overrides are not permitted under Florida's current capital sentencing scheme. *See* § 921.141, Fla. Stat. (2018).

2 *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017); *see Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

All Citations

254 So.3d 324, 43 Fla. L. Weekly S374

End of Document

Attachment B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 20, 2018

Mr. Martin J. McClain
McClain & McDermott, P.A.
141 NE 30th Street
Wilton Manors, FL 33334

Re: Edward J. Zakrzewski, II
v. Florida
Application No. 18A651

Dear Mr. McClain:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on December 20, 2018, extended the time to and including February 17, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob A. Levitan
Case Analyst