

IN THE SUPREME COURT OF FLORIDA

LUCIOUS BOYD,
Appellant,

v.

Case No.: SC18-1589

STATE OF FLORIDA,
Appellee.

RESPONSE TO ORDER TO SHOW CAUSE

Appellant Lucious Boyd, by and through undersigned counsel, responds to this Court's order of November 1, 2018 directing Mr. Boyd to show cause why the trial court's order denying his Successive Rule 3.851 motion should not be affirmed based on this Court's precedent in *Hurst v. State (Hurst)*, 202 So. 3d 40 (2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

Mr. Boyd is under a sentence of death, and he has the right to appeal and be meaningfully heard. *See* Fla. Stat. § 924.066 (2016); Fla. R. App. P. 9.140 (b)(1)(D). Mr. Boyd's right to appeal is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This Court's

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denial of full briefing and review violates Mr. Boyd's rights under the Fourteenth Amendment.

This Court's denial of full appellate review also violates the Eighth Amendment under *Furman v. Georgia*, 408 U.S. 238 (1972). This Court's jurisdiction is mandatory in capital cases for a reason. *See Fla. R. App. P. 9.030(a)(1)(A)(i)*. The U.S. Supreme Court counts on this Court's capital appeals process to ensure that the death penalty "will not be imposed in an arbitrary or capricious manner," and "to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system. . . ." *See Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976).

"The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have **a fair opportunity** to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. at 2001. Denying Mr. Boyd a fair opportunity to fully present and argue his claims does not comport with due process or *Hall v. Florida*.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Mr. Boyd requests oral argument under Fla. R. App. P. 9.320 and asks the Court to allow full briefing. Depriving Mr. Boyd of the opportunity for full merits review would violate his right to habeas corpus under Article I, § 13 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the U.S. Constitution.

ARGUMENT

Introduction

This Court's briefing order directed Mr. Boyd to address why the lower court's order should not be affirmed based upon the Court's precedents in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert denied*, No. 16-998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). This Court's decisions in *Hurst*, *Mosely*, and *Davis*, however, did not address the specific constitutional arguments Mr. Boyd is now presenting. Mr. Boyd is not advancing a "Hurst-based" claim premised upon *Hurst v. Florida* and/or *Hurst v. State*. Rather, Mr. Boyd's claim is based upon his substantive right pursuant to Chapter 2017-1 to findings of fact beyond a reasonable doubt on every element of capital first degree murder. This claim, and the constitutional rights implicated, are not the same as those previously presented to this Court by Mr. Boyd or the capital defendants in *Hurst*, *Mosley*, and *Davis*. Furthermore, unlike the decisions in those cases, the availability of relief for Mr. Boyd's claim pursuant to Chapter 2017-1 does not turn upon a harmless error analysis or Mr. Boyd's unanimous 12-0 jury recommendation.

The circuit court's denial of postconviction relief should not be affirmed on the basis of this Court's decisions in *Hurst*, *Davis*, or *Mosley* because the claim Mr. Boyd now presents was not before the Court in those cases and was not addressed

in those decisions. This Court's decision in *Hurst v. State*, while dealing with the Eighth Amendment, did not address the issues Mr. Boyd now raises. While this Court's decision, as argued *infra*, acknowledged the elements of capital first degree murder required to be found by a jury beyond a reasonable doubt under Fla. Stat. § 921.141, it did not address the application of that substantive right to Mr. Boyd's sentence under either the Eighth Amendment or the Due Process Clause.

Similarly, this Court's opinions in both *Mosley* and *Davis* also did not address the Eighth and Fourteenth Amendment claims Mr. Boyd now presents. The entirety of this Court's analysis in *Mosley* hinged on whether *Hurst v. Florida*, 136 S. Ct. 616 (2016)—a Sixth Amendment case—should apply retroactively to *Mosley* and if so, whether any possible *Hurst* error was harmless beyond a reasonable doubt. *See Mosley*, 209 So. 3d 1283-84 (emphasis added). This Court's decision in *Davis v. State*, likewise, was predicated upon *Hurst v. Florida* and the Sixth Amendment. This Court's denial of relief was based upon harmless error grounds as a result of *Davis*' unanimous jury recommendation. 207 So. 3d at 174-75. Neither of this Court's opinions in those cases, addressing Sixth Amendment rights, has anything to do with the substantive Eighth and Fourteenth Amendment rights Mr. Boyd is now asserting.¹ In short, because this Court's decisions in *Hurst*, *Mosley*, and *Davis*

¹ Additionally, this Court's denial of Mr. Boyd's prior state habeas petition in which he raised challenges to his sentence of death pursuant to *Hurst v. Florida* and *Hurst v. State*, also does not foreclose relief. Mr. Boyd's claims in his prior state

did not address the “other constitutional provisions” Mr. Boyd is now relying upon, and subsequently, because those issues were not decided in any of those cases, they are not dispositive to Mr. Boyd’s current Eighth Amendment and due process arguments.

In *McGautha v. California*, 402 U.S. 183 (1971), the U.S. Supreme Court addressed a challenge made under the Due Process Clause of the Fourteenth Amendment.² The claim was that death sentences imposed under statutes that gave juries total sentencing discretion violated due process. *Id.* at 196. (“[P]etitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.”). This challenge failed.

One year later, the U.S. Supreme Court heard an Eighth Amendment

habeas petition were not related to those he now raises pursuant to Chapter 2017-1, as it had not yet been enacted at the time of his filing back in November 2016. Moreover, any argument that this Court *sua sponte* addressed the merits of any of the arguments Mr. Boyd now raises is refuted by this Court’s one-line order denying relief which merely stated “The Petition for Writ of Habeas Corpus is hereby denied.” *See Boyd v. Jones*, No. SC16-1812, 2017 WL 318931, at *1 (Fla. Jan. 23, 2017), *reh’g denied*, No. SC16-1812, 2017 WL 1081115 (Fla. Mar. 22, 2017)

² *See McGautha*, 402 U. S. at 186 (“We granted certiorari in the *McGautha* case limited to the question whether petitioner’s constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards.”).

challenge that death penalty statutes gave the capital sentencer—whether judge or jury—absolute sentencing discretion, and that death sentences imposed under such a scheme were cruel and unusual because they were arbitrarily imposed. *Furman*, 408 U.S. at 240. The Court struck the statutes down under the Eighth Amendment. *Id.* at 310 (Stewart, J., concurring) (“the 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.”); *id.* at 313 (White, J., concurring) (“there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

In that situation, the Eighth Amendment challenge succeeded even though the due process challenge had failed. The statutory defect alleged in *Furman* was virtually the same as the statutory defect alleged in *McGautha*. But the defect was challenged under a different constitutional amendment, which resulted in a different outcome. Despite the fact that a challenge to the same statute had failed under Fourteenth Amendment grounds, the petitioners in *Furman* were provided an opportunity to be heard and show that their executions were not permissible under the Eighth Amendment. The same opportunity must be provided Mr. Boyd here where his constitutional arguments now raised were not previously addressed by this Court in *Hurst v. State*, *Mosley*, or *Davis*.

Without the right to be meaningfully heard on their Eighth Amendment

challenge, the petitioners in *Furman* would have been left with unreliable death sentences and no means to challenge the standardless sentencing discretion given to the juries that had imposed the death sentences:

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.

In re Gault, 387 U.S. 1, 19-20 (1967). The due process right to be meaningfully heard is particularly acute when an inmate is under a sentence of death. *See Hall v. Florida*, 134 S. Ct. at 2001 (“The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.”).

Just as in *McGautha/Furman*, Mr. Boyd’s arguments are different than those presented in *Hurst*, *Mosley*, and *Davis*—and those he previously presented under *Hurst v. Florida* and *Hurst v. State*—because they rely on different legal arguments and/or different constitutional amendments. Mr. Boyd’s arguments must be heard and considered despite this Court’s decisions in *Hurst*, *Mosley* and *Davis*, just as *Furman*’s challenge was heard despite *McGautha*. Mr. Boyd’s arguments do not rest on the same legal principles and/or constitutional provisions on which *Hurst*, *Mosley*

or *Davis* relied, and this Court’s previous denial in *Boyd v. Jones*, No. SC16-1812, 2017 WL 318931, at *1 (Fla. Jan. 23, 2017), *reh'g denied*, No. SC16-1812, 2017 WL 1081115 (Fla. Mar. 22, 2017) provided no basis upon which to foreclose relief.

Mr. Boyd’s death sentence violates the Due Process Clause of the U.S. Constitution because under the revised Fla. Stat. § 921.141, death is only authorized if a jury finds the necessary elements required to convict of the greater offense of capital first degree murder.

This Court’s opinion in *Hurst v. State* found that § 921.141 identified the elements of capital murder that a jury must find to essentially “convict” someone of capital murder:

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.

202 So. 3d at 53-54. In doing so, this Court thus recognized that “capital murder” is a higher offense than first degree murder, with additional elements that must be found by a jury. The Court further recognized that these elements of the substantive crime of capital murder were **longstanding and appeared in the statute**. *See id.* at 53 (“As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308

(1991), under Florida law, ‘The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh the mitigating circumstances.’ *Id.* at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).”) (emphasis added).

When the Legislature enacted Chapter 2017-1 and revised Fla. Stat. § 921.141, it **confirmed** that a defendant convicted of first degree murder cannot receive a death sentence unless a unanimous jury returns a recommendation of death, after finding all of the requisite elements beyond a reasonable doubt: unanimously finding the existence of any aggravating factor, that the aggravators that are unanimously found to exist beyond a reasonable doubt are sufficient to justify death, and that the aggravators outweigh the mitigators. Even if the jury makes those determinations, it must also unanimously reject mercy in favor of death. Only then can a judge impose a death sentence.

Under the revised § 921.141 enacted on March 13, 2017, the statutory maximum sentence that can be imposed on a first degree murder conviction is life imprisonment. For a death sentence to be permissible, the defendant must be convicted of a higher degree of murder; i.e., capital first degree murder. The revised § 921.141 provides for proof of the elements necessary to raise a conviction of first degree murder to capital first degree murder, to be presented at a penalty phase proceeding. But a unanimous jury’s finding that the State has proven the necessary elements beyond a reasonable doubt is functionally **a verdict finding the defendant**

guilty of the greater offense of capital first degree murder.

Identifying the facts or elements necessary to increase the authorized punishment is a matter of substantive law, and substantive law governs from the date of enactment of the statute. In *Alleyne v. United States*, 570 U.S. 99, 114-15 (2013), the U.S. Supreme Court held:

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.**

(emphasis added). The identification of the facts necessary to increase the authorized punishment was noted to be a matter of substantive law. *Id.* at 113-14. (“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.”).

A court decision identifying the elements of a statutorily defined criminal offense constitutes substantive law that dates back to the enactment of the statute. *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 v. Lane*, 489 U.S. 288 (1989), 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. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).”). *See also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) (“A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.”).

In *Fiore v. White*, 531 U.S. 225, 226 (2001), the U.S. Supreme Court addressed the import of the Due Process Clause in the context of substantive law defining a criminal offense: “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.” But before resolving the issue, the U.S. Supreme Court asked the Pennsylvania Supreme Court to explain the basis for its decision regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted.³ The Court

³ Fiore was convicted of operating a hazardous waste facility without a permit. While Fiore had a permit, the State had “argued that Fiore had deviated so dramatically from the permit’s terms that he nonetheless had violated the statute.”

wanted to determine whether the decision construing the criminal statute was a new interpretation or a straightforward reading of the statute. *Id.* at 226.

The Pennsylvania Supreme Court explained that its earlier “ruling merely clarified the plain language of the statute.” *Id.* at 228. This meant that the ruling dated back to the statute’s enactment. It was the substantive law when the statute was enacted. The U.S. Supreme Court held the Due Process Clause was violated and collateral relief was warranted:

This Court’s precedents make clear that Fiore’s conviction and continued incarceration on this charge violate due process. 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.**

Id. at 228-29 (emphasis added). Because Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid.

Fiore v. White, 531 U.S. at 227. On the State’s theory, Fiore was convicted. After Fiore’s unsuccessful appeals had concluded, the Pennsylvania Supreme Court in a different case held: “[t]he statute made it unlawful to operate a facility without a permit; one who deviated from his permit’s terms was not a person without a permit; hence, a person who deviated from his permit’s terms did not violate the statute.” *Id.* at 227. After Fiore unsuccessfully challenged his conviction in state court collateral proceedings based on the Due Process Clause, he sought federal habeas relief. “The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone’s case, had announced a new rule of law and thus was inapplicable to Fiore’s already final conviction.” *Id.*, at 227.

Just as the Pennsylvania Supreme Court had done in *Fiore*, this Court in *Hurst v. State* read the plain language of Florida’s capital sentencing statute and saw the statutorily required facts necessary to convict a defendant of capital first degree murder:

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.

The enactment of Chapter 2017-1 and the subsequent revision of Fla. Stat. § 921.141 served to further substantiate their integral inclusion in Florida’s capital sentencing scheme. Just as in *Fiore*, *Hurst v. State* did not create a new rule; it merely identified the substantive law set forth in the previously enacted version of § 921.141. The result here must be the same as in *Fiore*. Absent a unanimous jury determination of each element of capital first degree murder beyond a reasonable doubt, collateral relief is required.

Under the governing substantive law at the time of the homicide at issue in Mr. Boyd’s case, he was not convicted of capital first degree murder because the elements set forth in *Hurst v. State* and confirmed in Chapter 2017-1 were not found to have been proven beyond a reasonable doubt by a unanimous jury. Nor was the

jury even instructed on the requirement to find each element of the greater offense of capital first degree murder beyond a reasonable doubt.

The U.S. Supreme Court has 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.” *In re Winship*, 397 U.S. 358, 364 (1970).⁴ In *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000), the Supreme Court explained:

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. Taken together, these rights indisputably entitle a criminal defendant to “**a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.**” *United States v. Gaudin*, 515 U.S. 506, 510 (1995). *See also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Winship*, 397 U.S., at 364 (“[T]he 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”).

⁴ *See also Patterson v. New York*, 432 U.S. 197, 215 (1977) (“a State must prove every ingredient of an offense beyond a reasonable doubt, and [] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense”); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (since the jury may have read the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied “his right to the due process of law”).

Apprendi, 530 U.S. at 476-77 (emphasis added).⁵ The Supreme Court observed that the reasonable doubt standard demanded by due process protects against erroneous convictions and government overreach:

As we made clear in *Winship*, the “reasonable doubt” requirement “has [a] vital role in our criminal procedure for cogent reasons.” 397 U.S., at 363, 90 S. Ct. 1068. Prosecution subjects the criminal defendant both to “the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.” *Ibid.* We thus require this, among other, procedural protections in order to “provid[e] concrete substance for the presumption of innocence,” and to reduce the risk of imposing such deprivations erroneously. *Ibid.*

⁵ *Apprendi* also noted the historical basis for the due process right:

Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. “The ‘demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula “beyond a reasonable doubt” seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.’ C. McCormick, *Evidence* § 321, pp. 681-682 (1954); *see also* 9 J. Wigmore, *Evidence* § 2497 (3d ed.1940).” *Winship*, 397 U.S., at 361. We went on to explain that the reliance on the “reasonable doubt” standard among common-law jurisdictions “reflect[s] a profound judgment about the way in which law should be enforced and justice administered.”

Apprendi, 530 U.S. at 478.

Apprendi, 530 U.S. at 484. The due process requirement was further enunciated in *Sullivan v. Louisiana*,

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, e.g., *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952), and must persuade the factfinder “beyond a reasonable doubt” of the facts necessary to establish each of those elements, see, e.g., *In re Winship*, 397 U.S. 358, 364 (1970); *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam).

508 U.S. 275, 277-78 (1993). The *Sullivan* Court found the failure to instruct the jury on the “beyond a reasonable doubt” standard to be structural error.

Florida’s substantive law identifies the elements that separate first degree murder from capital first degree murder. To be convicted of capital first degree murder, those elements must be found **in addition to** the elements of first degree murder. A conviction of capital murder without a unanimous jury’s finding that the State proved those additional elements beyond a reasonable doubt violates the Due Process Clause. See *In re Winship*, 397 U.S. 358 (1970). The jury verdict, however it is labeled in the statute, is functionally a determination of the defendant’s guilt of that higher criminal offense: capital first degree murder. See *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (“[A]ll facts essential to imposition of the level of punishment that the defendant received—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury

beyond a reasonable doubt.”). Without a constitutional conviction of capital first degree murder, any death sentence imposed is illegal because it exceeds the statutory maximum for a first degree murder conviction.

The fact that elements of capital first degree murder have been present since the enactment of § 921.141 is further supported by the constitutional prohibition against *ex post facto* laws. Article I, § 10 of the U.S Constitution provides: “No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts” Under the *Ex Post Facto* Clause, the substantive criminal law setting forth the elements of capital first degree murder must have been in existence on the day the crime occurred. Applying a criminal law enacted after a crime was committed that changes the elements or increases the punishment for that crime is expressly prohibited. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977) (extending the protections of the *Ex Post Facto* Clause to the judiciary).

The substantive criminal law identifying the elements necessary to convict a defendant of capital first degree murder and authorize the imposition of a death sentence must have been in place at the time of Mr. Boyd’s crime. If Chapter 2017-1 established new elements that did not exist on the date of the homicide, the use of those elements to convict a defendant of the higher degree of murder or to enhance the punishment would be prohibited. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964). That would mean every capital defendant who has been convicted of a

homicide committed before the enactment of Chapter 2017-1 on March 13, 2017 or the decision in *Hurst v. State* on October 14, 2016 could not be convicted of capital first degree murder.

However, jury instructions provided since the statute was revised establish that Chapter 2017-1 is being treated as controlling even when the crime was committed in 2006, before the revised § 921.141 was enacted on March 13, 2017. For example, at Kendrick Silver's trial in June 2017, the jury instructions promulgated as a result of the revision of § 921.141 provided that the jury was required to unanimously find that the State had proven all of the requisite elements of capital murder beyond a reasonable doubt before returning a death recommendation. In essence, the penalty phase at Silver's trial served as determination of whether he was guilty of first degree capital murder, which is murder plus the four elements the jury is required to unanimously find under the revised § 921.141. The jury's subsequent life recommendation was essentially an acquittal of the higher degree of murder which precluded the judge from imposing a death sentence.

In fact, cases in which death sentences have been vacated and new "penalty phases" ordered show that the State views the revised § 941.121 as controlling in homicides dating as far back as 1978. For example, William White's death sentence was vacated and a new "penalty phase" was ordered by a circuit court for a first

degree murder committed in 1978. The State decided it would not seek to prove the required elements of capital first degree murder beyond a reasonable doubt, and the judge imposed the only sentence he was authorized to impose for first degree murder: life imprisonment.

In *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), this Court vacated a death sentence for a first degree murder committed in 1981. Because a jury had not unanimously found that the State had proven beyond a reasonable doubt the existence of the elements necessary to convict Card of capital first degree murder, this Court vacated his death sentence. On remand, the jury will have to convict Card of capital first degree murder before a death sentence can be imposed. *Card* demonstrates that the substantive law at the time of the 1981 homicide at issue in that case required proof beyond a reasonable doubt of the elements of capital first degree murder identified in *Hurst v. State* and confirmed in Chapter 2017-1. This means that this was Florida's substantive law at the time of the homicide at issue in Mr. Boyd's case.

Treating the revised § 921.141 as governing capital prosecutions arising from murders committed before the revisions were enacted shows that prosecutors do not see the retrospective application of the revised statute as violating the *Ex Post Facto* Clause. Those prosecutors are treating the elements of capital first degree murder set forth in § 921.141 as defining the criminal offense of capital first degree murder at

the time of the 1978 and 1981 homicides at issue in *White and Card*.

This Court's opinion in *Victorino v. State*, 241 So. 3d 48 (Fla. 2018) further supports Mr. Boyd's claim that the substantive elements identified in *Hurst v. State* and confirmed by Chapter 2017-1 have been present since the enactment of the statute in 1972. In *Victorino*, this Court explained that the statute "**neither alters the definition of criminal conduct nor increases the penalty**" for capital first degree murder and therefore is not an *ex post facto* law. *Id.* at 50. In finding no *ex post facto* violation, this Court confirmed that the elements of capital first degree murder have been present since the statute was enacted.

The facts this Court identified in *Victorino* are elements that the State was required to prove beyond a reasonable doubt under *Jones v. United States*, 526 U.S. 227, 232 (1999) ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."). These facts have been statutorily defined as necessary to the imposition of a death sentence since 1973.

Mr. Boyd's conviction and sentence are not valid as he was never convicted under Florida law of the offense of capital first degree murder. Mr. Boyd's jury was never instructed on the requirement that it find three of the four elements of capital first degree murder beyond a reasonable doubt, i.e. 1) the aggravators were

sufficient, 2) the aggravators outweighed the mitigators, and 3) there was no basis for a single juror to be merciful and vote to impose a life sentence. The failure to instruct the jury on the need to find all of the elements of a criminal offense beyond a reasonable doubt violates the Due Process Clause. Because, just like in *Fiore*, the Florida Supreme Court held that the elements were not added but had been part of the statute since its enactment in 1972, the Due Process Clause is implicated and governs. Mr. Boyd is entitled to relief.

For Mr. Boyd to be convicted of capital first degree murder and subject to a death sentence, a jury has to have returned a verdict, not merely an advisory recommendation, finding these elements proven beyond a reasonable doubt. Because that has not occurred, his death sentence stands in violation of the Due Process Clause and the Eighth Amendment.

CONCLUSION

This Court's decisions in *Hurst*, *Davis* and *Mosley* do not foreclose relief in this appeal, because the specific issues Mr. Boyd raised below were not decided by this Court in any of those cases. Under the governing law **at the time of the homicide** at issue here, Mr. Boyd was not convicted of capital first degree murder because the elements recognized in *Hurst v. State* and confirmed in Chapter 2017-1 were not found by a unanimous jury to have been proven beyond a reasonable doubt. Mr. Boyd asks this Court to vacate his death sentence and remand his case to the

circuit court for a new penalty phase that comports with the requirements of the U.S. Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this response has been served via the e-filing portal to Assistant Attorney General Leslie Campbell at *leslie.campbell@myfloridalegal.com* and *capapp@myfloridalegal.com* on November 20, 2018.

/s/ Suzanne Keffer
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