

IN THE SUPREME COURT OF FLORIDA

LUCIOUS BOYD,
Appellant,

v.

Case No.: SC18-1589

STATE OF FLORIDA,
Appellee.

_____ /

**APPELLANT’S REPLY TO STATE’S RESPONSE TO ORDER TO SHOW
CAUSE**

Appellant Lucious Boyd, by and through undersigned counsel, replies to the State’s Response to this Court’s order directing Mr. Boyd to show cause why the trial court’s order denying his Rule 3.851 motion should not be affirmed in light of this Court’s holdings 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).

This Court has not defined what constitutes “cause,” nor has the Court revealed the applicable standard of review. Still, Mr. Boyd attempted to respond to this Court’s order by generally outlining the reasons why this Court’s decision in another individual’s case does not preclude relief for him. *Davis*, *Mosley*, and *Hurst v. State* do not foreclose relief in this appeal because the specific issues Mr. Boyd raised below were not decided by this Court. Under the governing law at the time of the homicide at issue, Mr. Boyd was not convicted of capital first degree murder

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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. Given the opportunity for full briefing and the complete appellate proceeding to which he is entitled, Mr. Boyd can show that relief is necessary and proper.

ARGUMENT

At the outset of its Response, the State argues that Mr. Boyd's claim pursuant to Chapter 2017-1 does not differ substantively than that which had been previously raised in his prior habeas petition and therefore is procedurally barred under law of the case doctrine and collateral estoppel. Response at 5-6. The State contends this Court's previous finding of harmless error in both Mr. Boyd's prior *Hurst* litigation in his state habeas petition, as well as in other unanimous jury recommendation death cases,¹ precludes relief. Response at 7. The State further notes that the instructions given to Mr. Boyd's jury reflected the law as it existed at the time of trial and that his contemporaneous conviction of a prior violent felony and stipulation at trial to the facts which were later relied upon to support the Court's finding of the heinous, atrocious, and cruel (HAC) aggravator further negate any finding of harmful error. Response at 7-9.

¹ Citing *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018); *Hall v. State*, 212 So. 3d 1001, 1033-36 (Fla. 2017); *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017), *cert. denied*, 138 S. Ct. 1131 (2018); *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017), *cert. denied*, 138 S. Ct. 829 (2018).

Neither the law of the case nor collateral estoppel apply to bar litigation of Mr. Boyd's claim for relief based on Chapter 2017-1. As this Court made clear in *State v. McBride*, "[l]aw of the case principles do not apply unless the issues are decided on appeal." 848 So. 2d 287, 289 (Fla. 2003). In other words, the doctrine requires that the questions of law at issue were "***actually decided on appeal.***" *Id.* (emphasis added). This same principle is also true for the judicial doctrine of collateral estoppel. Collateral estoppel serves to prevent identical parties from re-litigation of the same issues that have already been decided. *McBride*, 848 So. 2d at 290. (citation omitted). It applies when an identical issue has been litigated between the same parties or their privies and was fully litigated and determined in a contest that results in a final decisions of a court of competent jurisdiction. *Id.* at 291. (citation omitted).

Neither doctrine is applicable to Mr. Boyd's current argument for relief where the claim which he is now presenting has not been "actually decided on appeal" or "fully litigated and determined in a contest resulting in a final decision of a court with competent jurisdiction." *McBride*, 848 So. 2d at 290-91. The State's argument here rests upon its faulty notion that Mr. Boyd's current claim is nothing more than a recapitulation of his previously raised *Hurst*-based litigation. As Mr. Boyd has argued, his claim is distinctly different than not only that which he has previously raised in his own case, but that which has also been previously rejected by this Court

in other unanimous jury recommendation capital cases as well. To the extent the State continues arguing Mr. Boyd is foreclosed from relief by shoehorning his current claim into prior litigation in his case or by comparison to this Court's decisions in other capital cases with unanimous jury recommendations, its' arguments mischaracterize his claim for relief and misconstrue the relevant case law.²

To be clear, Mr. Boyd is not arguing that Chapter 2017-1 "created a new crime of 'capital first-degree murder' necessitating resentencing." Response at 11. Rather, Mr. Boyd argues that the law as it has always existed be applied to his case. Mr. Boyd cites to this Court's decision in *Hurst v. State* for the pronouncement that the necessary elements of capital first degree murder arise from the statute itself and were longstanding and have been present since its enactment, *Hurst*, 202 So. 3d at 53. The enactment of Chapter 2017-1 and the subsequent revision of Fla. Stat. § 921.141 served to further substantiate their inclusion in Florida's capital sentencing scheme. *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. That argument is vastly

²This Court's decisions in *Hall v. State*, 246 So. 3d 210 (Fla. 2018) and *Philmore v. State*, 234 So. 3d 567, 568-69 (Fla. 2018) do not foreclose relief for Mr. Boyd's claim under the Eighth Amendment and Due Process Clause. Response at 9. While this Court determined in both of those cases that any potential *Hurst* error was harmless beyond a reasonable doubt due to the unanimous jury recommendations, this Court's denial of relief was not based upon the same Eighth and Fourteenth Amendment arguments now raised by Mr. Boyd.

different than contending the enactment of Chapter 2017-1 created a new substantive right as the State contends.

While the State characterizes this Court’s holding in *Hurst v. State* as having “qualified its use of the word ‘elements’ when referring to aggravating factors” as it pertained only to the jury’s role at sentencing, Response at 11 fn.7, that characterization falls flat. This is because this Court’s opinion in *Hurst v. State* clearly stated “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.**” 202 So. 3d at 53-54. In doing so, this Court 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. Thus, the State’s attempt to advance the argument that this Court’s use of the words “elements” simply referred to sentencing factors related to the jury’s role at penalty phase is wholly inaccurate. In fact, when *Hurst v. State* issued, Justice Canady wrote a dissenting opinion, which was joined by Justice Polston, objecting to how the majority opinion had turned facts referenced in the statute into elements. *Hurst v. State*, 202 So. 3d at 70, 77, 82.

Moreover, such an interpretation is directly in conflict with the language of *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst v. Florida* the United States Supreme Court held that:

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....” ***This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.*** *Alleyne v. United States*, 570 U.S. — —, ———, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held 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 a jury.***

136 S. Ct. at 621 (2016) (emphasis added). The United States Supreme Court’s language in *Hurst v. Florida* makes clear that the facts which expose a defendant in Florida to the greater punishment of a sentence of death, i.e. the unanimous findings by the jury at penalty phase as to the existence of aggravating factors, the sufficiency of the aggravators, and that the aggravators outweigh the mitigation, are elements for purposes of due process. Regardless of how they are characterized, either by the legislature or the Court, what matters is how those findings of fact operate to expose a defendant to the greater punishment of death. *See Ring v. Arizona*, 536 U.S. 584 (2002) (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 a jury beyond a reasonable doubt). To the extent that the State dismisses the significance of this distinction, arguing the “evolution” of the effect of an aggravating factor does not somehow morph the jury’s factual determination as to its existence into something other than a sentencing recommendation, Response at 11 fn.7, that logic runs afoul of clearly established federal law. No matter how many times the State refers to a jury’s “findings” as a sentencing recommendation, it cannot ignore that the jury’s findings are unanimous and binding and thus tantamount to a verdict of capital first degree murder.

Mr. Boyd was not convicted of all the elements necessary for the imposition of a death sentence. Response at 13. Due process required that Mr. Boyd’s jury return findings of fact, unanimously and beyond a reasonable doubt, as to each element necessary for the imposition of death under Fla. Stat. § 921.141. *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). Those were the factual findings required under § 921.141 at the time of Mr. Boyd’s crime, and because that did not occur, his death sentence is not constitutionally valid.

The State maintains that Mr. Boyd’s jury was instructed correctly based on the statute in effect at the time of his trial. The State’s trumpeting of this fact, however, ignores that it is of no consequence that Mr. Boyd’s jury was instructed

based on a longstanding misunderstanding of what was required to convict a defendant of capital first degree murder. *See Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) (“This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague 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.”).

This Court’s recognition that these elements were necessary to increase the authorized punishment was a not “merely a procedural change in sentencing,” Response at 13. As Mr. Boyd argued in his response to this Court’s show cause order, the identification of the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *Alleyne v. United States*, 570 U.S. 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.”). And as this Court noted in *Hurst v. State*, these elements were longstanding and had been in existence since its enactment. 202 So. 3d at 53. Contrary to the State’s argument, it does not simply then “follow[] that Chapter 2017-1, as found in the revised § 921.141, Fla. Stat., is a procedural change applicable to pending prosecutions only” because of this Court’s prior decision in *Jackson v. State*, 213 So. 3d 754 (Fla. 2017). Response at 13-14. Such an argument ignores the fact that Chapter 2017-1 has been retrospectively applied in cases of other capital defendants for crime dating as far back as 1981. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). The reality that the revised Fla. Stat. § 921.141 is being applied to capital defendants whose crimes were committed long before the statute’s enactment eviscerates any argument that it is not being applied retrospectively in practice and that some capital defendants are being given the benefit of it while others arbitrarily are not.

While defendants are not “entitled to a new penalty phase every time there is a change in the sentencing statute,” Response at 14 (citation omitted), they are constitutionally entitled to a finding, beyond a reasonable doubt, of all the elements necessary for conviction of a particular crime as it is enacted at the time they committed the offense. *Fiore*, 531 U.S. at 228-29; *In Re Winship*, 397 U.S. 358, 364 (1970). Because that did not occur in Mr. Boyd’s case, his sentence of death is not constitutionally valid. Indeed, as the State contends, “[t]he only statute relevant is

the statute that existed at the time [Mr.] Boyd's case became final." Response at 14. And as this Court's jurisprudence and clearly established federal law make clear, under Fla. Stat. § 921.141 Mr. Boyd's jury was required to return unanimous findings beyond a reasonable doubt on all elements of capital first degree murder in order to be constitutionally valid under the Eighth and Fourteenth Amendment.³

CONCLUSION

This Court's decisions in *Davis*, *Mosely*, and *Hurst* do not foreclose relief in this appeal because the specific issues Mr. Boyd raised below were not decided by this Court in those cases. Under the governing law **at the time of the homicide** at issue, 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, nor was the jury ever instructed on the requirement to find each element of capital first degree murder 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 United States Constitution.

³ To the extent that the State also cites to Article X, section § 9 of the Florida Constitution, Mr. Boyd would note the passage by Florida voters of Amendment 11 on November 6, 2018 repealing the Savings Clause.

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 December 10, 2018.

/s/ Suzanne Keffer

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