IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-1999

JOSE ANTONIO JIMENEZ,
Petitioner,

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections,
Respondent.

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

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REPLY TO RESPONDENT'S ARGUMENT

The labeling Respondent uses in her response made Mr. Jimenez think of the word "Orwellian." In researching that word, Mr. Jimenez found that the use of language which he thinks of as Orwellian is also called "doublespeak." The main characteristics of "doublespeak" has been explained in the following way:

> What is really important in the world of doublespeak is the ability to lie, whether knowingly or unconsciously, and to get away with it; and the ability to use lies and choose and shape facts selectively, blocking out those that don't fit an agenda or program.

Herman, *Beyond Hypocrisy: Decoding the News in an Age of Propaganda*, South End Press (1992).

Mr. Jimenez also thought of Justice Scalia's concurrence in *Ring v. Arizona* and his point that the constitution is concerned with function, not a label strategically place that may hide the function from the prying eyes of the constitution. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("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.").

The response is an exercise in labeling that seeks to block actual consideration of the claim set out in Mr. Jimenez's petition. Another way of

phrasing, the Respondent in the labeling and language used in the response seeks to present a narrative which belittles Mr. Jimenez's claim and legal analysis as a way to justify not actually engaging in a real discussion of the claim.[1]

Respondent was previously successful in urging this Court to ignore the claim Mr. Jimenez presented in a habeas petition he filed with this Court on December 11, 2002. *See Jimenez v. Crosby*, Case No. SC02-2600. Claim III of that petition was captioned: "The Florida Capital Sentencing Procedures As Employed In Mr. Jimenez's Case Violated His Sixth Amendment Right To Have A Jury Return A Verdict Addressing His Guilt Of All The Elements Necessary For The Crime Of Capital First Degree Murder." In the claim, Mr. Jimenez quoted from § 921.141 those facts that were required to be found before a death sentence could be imposed. He then explained: "Thus, it is clear that the factual determination of 'sufficient aggravating circumstances' at the sentencing is the finding of those additional facts that are necessary . . . beyond the traditional definition of first degree murder." Petition at 47, Case No. SC02-2600. With Respondent belittling Mr. Jimenez's claim, this Court issued a one sentence order denying the petition over Chief Justice Anstead's dissent asserting that the *Ring*

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[1]To be fair to opposing counsel, there are many who maintain that this is what attorneys are expected to do on behalf of their client.

claim should be denied without prejudice so that the claim could be presented in a Rule 3.851 motion. It may have taken a few years, but this Court ultimately came to agree with the assertion in Claim III of that habeas petition that the statutorily identified facts were elements of capital murder. *See Hurst v. State*, 202 So. 3d 40, 53-54 (Fla. 2016) ("these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— *54 are also elements that must be found unanimously by the jury").

Respondent's response must be deconstructed so that it can be recognized as an effort, whether conscious or unconscious, to prevent this Court from actually examining and/or seriously considering Mr. Jimenez's claim. First, there is Respondent's opening sentence which says: "Petitioner falls short of raising appropriate state habeas claim". Response at 1. In the next paragraph, there appears to be a sentence that is suppose to identify why Mr. Jimenez's claim is called not "an appropriate state habeas claim." The subsequent sentence in the next paragraph provides: "Under this Court's established precedent, habeas petitions are reserved to challenge the effectiveness of appellate counsel." If Respondent read Mr. Jimenez's petition, she would know that this statement just is not true. In the petition, Mr. Jimenez wrote:

> This Court has used its habeas jurisdiction to vacate death sentences

> that violated either provisions of the United States Constitution or the Florida Constitution. *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017); *Hernandez v. Jones*, 217 So. 3d 1032 (Fla. 2017); *Card . Jones*, 219 So. 3d 47 (Fla. 2017); *Brooks v. Jones*, 2017 WL 944235 (Fla. 2017).

Petition at 9-10.[2]

Another example of Respondent's efforts to thwart any consideration of Mr. Jimenez's claim is this assertion: "Jimenez raised the identical argument through *Hurst v. State*, 202 So. 3d 40, 60 (Fla. 2016) ... even though this case was final long before the issuance of *Ring v. Arizona*". Getting the discussion to be about this internally inconsistent statement avoids consideration of the claim itself. A claim raised on the basis of *Hurst v. State* cannot by definition be identical with a claim based on the passage of a constitution amendment. Similarly, a claim based on a change in the substantive criminal law in a statute altering the elements of a

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[2]Respondent later asserts that Mr. Jimenez should not be permitted to file a successive habeas petition. Yet, James Card's third habeas petition raising a claim based on *Hurst v. State*, not an appellate IAC claim was granted, and his death sentence was vacated. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). In fact, the decision granting Card's habeas petition is a feature of Mr. Jimenez's claim. Surely, Respondent must have become aware of *Card v. Jones* if she read the petition. Respondent's knowledge of *Card v. Jones* would show that the response is engaging in doublespeak trying to hide from actually engaging in a discussion of the claim.

As noted in the Petition, a resentencing was ordered in James Card's case. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Card was convicted of a 1981 homicide. His conviction became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). When the resentencing occurs, the State has acknowledged that Chapter 2017-1 will apply because the legislature intended it to apply.

criminal offense cannot be identical to claim based upon a judicial decision. Moreover, Respondent seeks also to hide from the reality that dozens of individuals that received resentencings from this Court on the basis of *Hurst v. State*, had previously raised what Respondent would call the "identical" claim on the basis of *Ring v. Arizona*. When there is new law, in the form of a decision from the United States Supreme Court, or in the form of the enactment of a revised statute, or in the form of the approval of a constitutional amendment, prior rulings of this Court have routinely been called into question. So again, Respondent has used the word identical to denigrate Mr. Jimenez's claim and detract attention from its content, even though the approval of a constitutional amendment is a major change that demonstrates the will of the people which this Court under precedent is supposed to honor. Certainly, Respondent knows that constitutional amendments are important.

As for the reference to Jimenez's death sentence being final before *Ring v. Arizona* issued, that is another attempt to distract from the fact that *Ring v. Arizona* did not address Florida's law. It did not change Florida's substantive law. It did not identify the elements of capital murder in Florida. It did not change Florida's constitution or have any impact on the Savings Clause. *Ring* was a Sixth Amendment decision that has been described as creating a new procedural rule.

And while this Court did find that new procedural rule led to *Hurst v. Florida* and in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), used the retroactivity analysis in *Witt v. State*, 387 So. 2d 922 9Fla. 1980), to conclude that the procedural rule in *Hurst v. Florida* should be applied retroactively to the day *Ring* issued, that is not relevant to considerations of changes in substantive criminal law and the date that the change in substantive law was made. *See Bunkley v. Florida*, 538 U.S. 835 (2003) (the use of the *Witt* standard without reference to *Fiore v. White* to decide whether a case construing substantive criminal law was retroactive violated due process). However despite Respondent's erroneous labeling and misrepresentation of Mr. Jimenez's claim, the truth is that Mr. Jimenez's claim is not based upon the Sixth Amendment, it is not based on *Hurst v. Florida*, and it is not based on *Ring v. Arizona*, all of which would involve a procedural rule.

At issue in Mr. Jimenez's claim is Florida's substantive criminal law, at issue are changes made in Florida's substantive criminal law by legislative enactments. At issue in Mr. Jimenez's claim is the limit that the Savings Clause placed on the legislature's power to retrospectively change Florida's substantive criminal law in a way that worked to the State's advantage.

Respondent does not want to talk about the Savings Clause because a discussion of its would show that this Court in *Hurst v. State,* construing §

921.141, found it contained elements that a jury had to find unanimously. Under the Savings Clause, this statutory law that governed Hurst's prosecution and his punishment was the law in effect on the date of the homicide, May 2, 1998. So when this Court construed § 921.141 as identifying elements that a jury had to unanimously find, by virtue of the Savings Clause, it was construing what was required by § 921.141 on May 2, 1998, not on June 24, 2002.[3] And when this Court granted habeas relief in *Card v. Jones*, under the Savings Clause that meant that this Court found that at the time of the homicide in *Card* in 1981, § 921.141, in 1981, required the statutorily identified facts to be found beyond a reasonable doubt in accord with *In re Winship* and the Due Process Clause before Card could be given a death sentence.

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[3]This Court has held that the elimination of a convicted defendant's eligibility for parole after serving 25 years on first degree murder conviction was a matter of substantive law. The change was not intended to apply retrospectively, i.e. to homicides committed before its 1994 effective date. *See Craig v. State*, 685 So. 2d 1224, 1230 n.12 (Fla. 1996) ("Because Craig committed his crime on July 21, 1981, he is not eligible to receive a life sentence without the possibility of parole."). In *Bates v. State*, 750 So. 2d 6, 10 (Fla. 1999), this Court indicated that even though Bates was resentenced after the 1994 effective date for a crime committed in 1982, his substantive right to parole eligibility remained intact at his resentencing. The 1994 elimination of parole eligibility after the convicted defendant had served 25 years was not intended to apply retrospectively. As a result, the statutory change was not applied to defendants convicted of homicides committed before the statutes effective date. *Bates v. State*, 750 So. 2d at 10 ("We have previously held that this statute was not applicable to crimes committed before its effective date.").

No, Respondent does not want this Court to actually look at the substantive law, but the procedural rule from *Hurst v. Florida*, because *Bunkley v. Florida* held the *Witt* retroactivity analysis does not cut it, does not satisfy the Due Process Clause when the issue is what date is the date that the changes made when the legislature's revision of § 921.141 establish what facts had to be proven present on the day that the homicide was committed.

Respondent seeks to distract by referring to the effective date of Amendment 11, something that was not on the ballot summary. If Respondent wants to talk about this then that means that the Florida Attorney General contacted the Governor on November 15, 2018, to get him to reschedule Mr. Jimenez's execution before Amendment 11, which had been approved, became effective in order to execute one last person before Amendment 11's effective date. Because given Respondent's reference to the effective date of Amendment 11, that means that Mr. Jimenez is right on the merits and what the will of the people was in approving Amendment 11. There is no other reason to reference the effective date if Mr. Jimenez's is otherwise wrong.

Surely rushing to execute Mr. Jimenez before Amendment 11 is effective despite the overwhelming will of the people who approved it shows an unequal application of the law and a violation of the Equal Protection Clause.

It is worth noting that last week in the pending case of *Boyd v. State*, Case No. SC18-1589, the State filed it Reply to the Response to Show Cause Order and relied on the Savings Clause to argue that the revised § 921.141 "does not apply to Boyd." Reply to response at 15. That argument is exactly the basis of Mr. Jimenez's claim: that the use of the Savings Clause to preclude death sentenced individuals who were not convicted of capital murder, i.e. first degree murder plus the statutorily identified facts, from the benefit of the revised statute is unconstituional.

Respondent also falsely represents that Mr. Jimenez's argument is that he receive a life sentence. His claim is actually that he receive at least what Jim Card, Paul Johnson and even Tim Hurst received.

CONCLUSION

Habeas relief is required. Mr. Jimenez's death sentences must be vacated and at a minimum, a resentencing ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Lisa-Marie Lerner, Assistant Attorney General, on this 10th day of December, 2018.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 14 point Times New Roman type, a font that is not proportionately spaced.

/s/ Martin J. McClain
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