

DOCKET NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

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BRANDY BAIN JENNINGS,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI

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## INDEX TO APPENDICES

### **Appendix A**

Florida Supreme Court opinion affirming the denial of postconviction relief, reported as *Jennings v. State*, 237 So.3d 909 (2018).

### **Appendix B**

Trial court's Final Order Denying Defendant's Successive Motion For Postconviction Relief, referenced as *State v. Jennings*, Order, Case No. 95-2284-CFA (Fla. 20th Jud. Cir. Apr. 4, 2017).

# **APPENDIX A**

237 So.3d 909  
Supreme Court of Florida.

Brandy Bain JENNINGS, Appellant,  
v.  
STATE of Florida, Appellee.

No. SC17-938  
|  
[January 29, 2018]

### Synopsis

**Background:** Motion was filed for post-conviction relief following affirmance of death sentence, 718 So.2d 144. The Circuit Court, Collier County, Frederick Robert Hardt, J., No. 111995CF002284AXXXXX, denied motion. Movant appealed.

**[Holding:]** The Supreme Court held that Supreme Court's *Hurst*, 136 S.Ct. 616, decision invalidating capital sentencing scheme did not apply retroactively to death sentence that became final in 1999.

Affirmed.

Pariante, J., concurred in result and filed statement.

Lewis and Canady, JJ., concurred in result.

**\*910** An Appeal from the Circuit Court in and for Collier County, Frederick Robert Hardt, Judge Case No. 111995CF002284AXXXXX

### Attorneys and Law Firms

Neal Dupree, Capital Collateral Regional Counsel, Bri Lacy, Staff Attorney, and Paul Kalil, Assistant Capital Collateral Regional Counsel, Southern Region, Ft. Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Christina Z. Pacheco, Assistant Attorney General, Tampa, Florida, for Appellee

### Opinion

PER CURIAM.

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

Jennings' 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). This Court stayed Jennings' appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), U.S. , 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, Jennings responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Jennings' response to the order to show cause, as well as the State's arguments in reply, we conclude that Jennings is not entitled to relief. A jury convicted Jennings of three counts of first-degree murder and recommended a death sentence for each murder by a vote of ten to two. Jennings v. State, 718 So.2d 144, 147 (Fla. 1998). Following the jury's recommendations, the trial court sentenced Jennings to death on all three counts of murder. Id. Jennings' sentences of death became final in 1999. Jennings v. Florida, 527 U.S. 1042, 119 S.Ct. 2407, 144 L.Ed.2d 805 (1999). Thus, Hurst does not apply retroactively to Jennings' sentences of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Jennings' motion.

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

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

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

LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, U.S. , 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed \*911 in my dissenting opinion in Hitchcock.

#### All Citations

237 So.3d 909, 43 Fla. L. Weekly S46

# **APPENDIX B**

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT  
IN AND FOR COLLIER COUNTY, FLORIDA**

**STATE OF FLORIDA,**  
**Plaintiff,**

vs.

**CASE NO: 95-2284-CFA**

**BRANDY JENNINGS,**  
**Defendant.**

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**FINAL ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION FOR  
POSTCONVICTION RELIEF**

THIS CAUSE comes before the Court on Defendant's "Successive Motion To Vacate Judgments Of Conviction And Sentence," filed on January 12, 2017. The Court notes that the State filed a response on February 1, 2017. A case management conference was held on February 17, 2017. Being otherwise fully advised, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Jennings v. State, 718 So. 2d 144 (Fla. 1998).

Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.

Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, [FN2] a Buck knife case, a pair of blood-stained gloves, and a Daisy air pistol. [FN3]

[FN 2] According to testimony at trial, a "Buck knife" is a particular brand of very sharp, sturdy knife that has an approximately four and one-half inch black plastic handle, into which folds the blade of the knife.

[FN 3] According to testimony at trial, a Daisy air pistol is like a pellet gun, but looks almost identical to a Colt .45 semi-automatic pistol.

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Jennings (age twenty-six) and Jason Graves (age eighteen), both of whom had previously worked at the Cracker Barrel and knew the victims, were apprehended and jailed approximately three weeks later in Las Vegas, Nevada, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have."

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence. [FN 4]

[FN 4] The evidence from the canal consisted of: clothes, gloves, socks, and shoes that Jennings said were worn during the crime; a homemade razor/scraper-blade knife and sheath that Jennings said belonged to Graves; packaging from a Daisy air pellet gun and CO2 cartridges; unused CO2 cartridges and pellets; money bags (one marked "Cracker Barrel"), bank envelopes, money bands, Cracker Barrel deposit slips, and some cash and coins; personal checks, traveler's checks, and money orders made out to Cracker Barrel; a clear plastic garbage bag; and rocks to weigh down the bundle of evidence.

The medical examiner, who performed autopsies on the victims, testified that they died from "sharp force injuries" to the neck caused by "a sharp-bladed instrument with a very strong blade," like the Buck knife found at the crime scene. A forensic serologist testified that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.

The State also presented testimony concerning previous statements made by Jennings regarding robbery and witness elimination in general. Specifically, Angela Chainey (sic), who had been a friend of Jennings', testified that about two years



before the crimes Jennings said that if he ever needed any money he could always rob someplace or somebody. Chainey (sic) further testified that when she responded, "That's stupid. You could get caught," Jennings replied, while making a motion across his throat, "Not if you don't leave any witnesses." On cross-examination, Chainey (sic) further testified that Jennings had "made statements similar to that several times."

The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, "I hate her. I even hate the sound of her voice." Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."

Jennings, 718 So. 2d at 145-147.

2. A jury convicted defendant of three counts of first-degree murder and one count of robbery, and recommended a sentence of death by a vote of ten to two. The Court followed the recommendation, and sentenced defendant to death for each first-degree murder conviction and sentenced him to fifteen years in prison for the robbery conviction. The Court found three aggravating factors, and found that the mitigating factors did not outweigh the aggravating factors. His convictions and sentences were affirmed on direct appeal by the Florida Supreme Court. *See Jennings v. State*, 718 So.2d 144 (Fla. 1998). The United States Supreme Court denied certiorari on June 24, 1999. *See Jennings v. Florida*, 527 U.S. 1042 (1999).

3. Defendant filed a postconviction motion on March 20, 2000 and amended motions on June 23, 2000 and August 4, 2009. The evidentiary hearing was held on April 28 and 29, 2010 and continued to August 11 and 12, 2010. The Court denied Defendant's amended postconviction motion. The Florida Supreme Court affirmed the denial. Jennings v. State, 123 So.3d 1101 (Fla. 2013).

4. In this current successive motion, Defendant raised three claims that he is entitled to

relief under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So.3d 40 (Fla. 2016). A case management conference was held on February 17, 2017. Having determined that the claims raised are purely legal arguments which do not require an evidentiary hearing, the Court makes the following findings as to Defendant's claims.

5. **As to Claim I**, Defendant argued that in light of Hurst v. Florida and Hurst v. State, his death sentences violate the Sixth and Eighth Amendments because there was not a unanimous jury verdict and the trial judge, not the jury, made the required findings. Defendant argued that these errors were not harmless beyond a reasonable doubt. Defendant argued that he was entitled to retroactive application of Hurst to his case due to fundamental fairness, under a Witt analysis, and that he had a federal right to retroactive application. Defendant pointed out that several pre-Ring cases for which sentences were overturned in collateral proceedings pending during Hurst are receiving the benefit of Hurst. At the case management conference and in his supplemental argument filed February 27, 2017, Defendant argued that fundamental fairness also required retroactive application of Hurst to his case, because partial retroactivity injects arbitrariness into the capital sentencing scheme in violation of the Eighth Amendment, citing Furman v. Georgia, 408 U.S. 238 (1972).

6. Defendant argued that although his case was final before Ring v. Arizona, 536 U.S. 583 (2002), he is still entitled to have the Hurst decisions apply retroactively to his case because he raised Ring-like claims in postconviction proceedings, citing Mosley v. State, \_\_\_ So.3d \_\_\_, 2016 WL 7406506, \*45 (Fla. 2016). Defendant contended that Mosley created two classes of defendants entitled to retroactive application of Hurst - those whose cases were final after Ring was decided, and those whose cases were final before Ring, but who preserved a Ring claim. Defendant argued that fundamental fairness, as argued in Mosley, also required retroactive application of the Hurst

decisions to his case. However, a plain reading of the opinion does not support that argument. In Mosley, the Florida Supreme Court held that for defendants whose cases were final after Ring, and who raised Ring claims in vain, Hurst v. State applied retroactively. Id. at \*25 (“Defendants who were sentenced to death under Florida’s former, unconstitutional capital sentencing scheme after Ring should not suffer due to the United States Supreme Court’s fourteen-year delay in applying Ring to Florida”). Mosley does not hold that Hurst applies retroactively for cases which were final before Ring was decided, even if a Ring claim was made. In Asay v. State, \_\_\_ So.3d \_\_\_, 2016 WL 7406538 (Fla. 2016), the Florida Supreme Court held that Hurst did not apply retroactively for any capital case final before Ring, because a new penalty phase for decades-old cases would be less complete and less accurate than the original proceedings. The Florida Supreme Court has not held that fundamental fairness acts as an alternative basis for retroactivity. On the contrary, the Florida Supreme Court cited fundamental fairness in Mosley only when analyzing why cases final after Ring should receive retroactive application of Hurst, since it had previously ruled in Asay that Hurst did not apply retroactively to cases final before Ring. No Florida Supreme Court case since Mosley has held that fundamental fairness can be used to make a retroactive application of Hurst to cases final before Ring. While Defendant cited to the concurring and dissenting opinions in Asay and Mosley in support of retroactive application to his case, this Court is bound by the majority opinions of the Florida Supreme Court. Hurst does not apply retroactively to Defendant’s case even though he raised a Ring-like claim. See Gaskin v. State, \_\_\_ So.3d \_\_\_, 2017 WL 224772 (Fla. 2017) (Hurst does not apply retroactively to a defendant whose case was final before Ring was decided, regardless of that defendant having raised and preserved Ring claims); Bogle v. State, \_\_\_ So.3d \_\_\_, 2017 WL 526507 (Fla. 2017). To the extent that Defendant argued that the Florida Supreme Court has not decided the retroactivity of Hurst v. State, or that the partial retroactivity set forth in

Mosley is arbitrary and violates the Eighth Amendment, the Court declines to extend the rulings of the Florida Supreme Court. Therefore, **Claim I is DENIED.**

7. **As to Claim II**, Defendant argued that his death sentences violate the Eighth Amendment. Defendant argued that the lack of juror unanimity regarding the sentence violated the Eighth Amendment and his death sentence constituted cruel and unusual punishment in light of Hurst. Defendant further argued that the jury verdict was not unanimous, the jury was advised that it was only rendering an advisory sentence, and the jury was not informed of its authority to dispense mercy, but was informed otherwise.

8. The State argued that this claim is procedurally barred, because the U.S. Supreme Court has never held that the Eighth Amendment requires unanimous jury verdicts in capital cases. The State argued that the U.S. Supreme Court overruled Spaziano v. Florida 468 U.S. 447 (1984) in Hurst v. Florida solely to the extent that it allowed a sentencing judge to find aggravating factors independent of a jury's factfinding, and did not overrule it on Eighth Amendment grounds. The State noted that the Florida Supreme Court is required by the Florida Constitution's conformity clause to interpret Florida's prohibition against cruel and unusual punishment in conformity with the Supreme Court's holdings on the Eighth Amendment. To the extent Defendant raised fairness, the State argued that the accuracy of Defendant's death sentence was not at issue, such that fairness did not demand retroactive application of Hurst.

9. Since the Hurst decisions do not apply retroactively to Defendant's case, he is not entitled to relief as a matter of law, and his death sentences do not constitute cruel and unusual punishment. Therefore, **Claim II is DENIED.**

10. **As to Claim III**, Defendant argued that his prior postconviction claims must be reconsidered in light of the Hurst decisions. Defendant argued that Hurst v. State and Perry v. State,

41 Fla. L. Weekly S449 (Fla. 2016), are new law that would apply at resentencing, and require the Court to revisit previously raised postconviction claims. Defendant argued that his previously presented postconviction claims must be re-visited and re-evaluated in light of the new Florida law which would govern at resentencing. Defendant cited to Hildwin v. State, 141 So.3d 1178 (Fla. 2014) and Swafford v. State, 125 So.3d 760 (Fla. 2013) in arguing that the standard for newly discovered evidence – whether a different outcome was probable – should be applied by the Court to reconsider all his prior postconviction claims in light of the requirement that the jury must now make all findings unanimously. Defendant believed that the prejudice analysis would be different now, and that the prior postconviction claims would be granted because there was a reasonable probability that on resentencing, at least one juror would again vote for a life sentence. The State argued that the cases relied on by Defendant apply to claims of newly discovered evidence, not to claims of new law. The State argued that Hurst “does not operate to breathe new life into unrelated, previously denied claims.” Response p. 13. As the State pointed out, Defendant cited to no legal authority which would authorize, much less require, this Court to reconsider previously denied postconviction claims. Defendant has not claimed the existence of any newly discovered evidence. Since Hurst does not apply retroactively to this case, Defendant is not entitled to relief as a matter of law. Therefore, **Claim III is DENIED**. Accordingly, it is

**ORDERED AND ADJUDGED** that Defendant's “Successive Motion To Vacate Judgments Of Conviction And Sentence” is DENIED. Defendant may file a notice of appeal within thirty (30) days of the date this order is rendered.

**DONE AND ORDERED** in Chambers at Naples, Collier County, Florida, this 4  
day of April, 2017.

  
Frederick R. Hardt

Circuit Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above Order has been furnished to **Carol M. Dittmar**, carol.dittmar@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 E. Frontage Road, 2nd Floor, Tampa, FL 33607; **Cynthia Ross**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Ft. Myers, FL 33901-0399; **Paul Kalil**, kalilp@ccsr.state.fl.us, ccrpleadings@ccsr.state.fl.us, Capital Collateral Regional Counsel - South, CCRC-S, 1 East Broward Blvd., Suite 444, Fort Lauderdale, FL 33301; **Bri Lacy**, lacyb@ccsr.state.fl.us, Capital Collateral Regional Counsel - South, CCRC-S, 1 East Broward Blvd., Suite 444, Fort Lauderdale, FL 33301; and **Administrative Office of the Courts (XIV)**, 1700 Monroe Street, Fort Myers, FL 33901; this 5<sup>th</sup> day of April, 2017.

DWIGHT E. BROCK  
Clerk of Court

By: *Tawn Williams*  
Deputy Clerk

