DOCKET NO. 18-7020 & 18A628

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

JOSE ANTONIO JIMENEZ,
Petitioner,

vs.

JULIE L. JONES,
Secretary, Florida Department of Corrections, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

EXECUTION SCHEDULED
December 13, 2018

RESPONDENTS' BRIEF IN OPPOSITION AND RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED FOR REVIEW

Whether Certiorari review should be denied because the Eleventh Circuit Properly Affirmed Dismissal of an Unauthorized Successive Habeas Petition as it was required to do under the AEDPA, and where even if the underlying petition was authorized, it was clear Jimenez would not be entitled to relief as the *Hurst* and *Brady* claims were meritless and do not conflict with any decision of this Court or involve an important, unsettled question of federal law.

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Rules

CITATION TO OPINION BELOW

The opinion below is the Eleventh Circuit Court of Appeals' decision hold that the district court correctly dismissed Jimenez's first two claims for lack of subject-matter jurisdiction and affirm on the basis of the district court's well-reasoned opinion reported at *Jimenez v. Sec'y, Florida Dep't of Corrections*, Case No. 18-15128 (11th Cir. Dec. 13, 2018).

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on December 13, 2018 affirming the district court's denial of jurisdiction because Jimenez had sought review in the district court without prior authorization under the AEDPA. Petitioner asserts jurisdiction under USCA 28 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Jose Antonio Jimenez is under an active death warrant which was signed on July 18, 2018, and the execution is scheduled for December 13, 2018. The relevant facts of Jimenez's murder are outlined in the Florida Supreme Court's opinion affirming Jimenez's conviction and sentence of death, *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997).

> On October 2, 1992, Jimenez beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. Jimenez slammed the door shut, locked the locks on the door, and fled the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then dropping to the ground. Rescue workers arrived several minutes after Jimenez inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, Jimenez spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.
>
> Jimenez's fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach. In 1994, a jury found him guilty of first-degree murder and burglary of an occupied dwelling with an assault and battery and unanimously recommended the death sentence. The court followed the jury's recommendation, finding four aggravating circumstances, one statutory mitigating circumstance, and two nonstatutory mitigating circumstances.

Jimenez, 703 So. 2d at 438-39. After the jury's unanimous death recommendation, the court found four aggravating factors: that the defendant was previously convicted of another capital felony or felony involving the use or threat of

violence; the murder was committed while Defendant was engaged in the commission of a burglary of an occupied dwelling; the murder was committed while Defendant was on community control; and the murder was especially heinous, atrocious, or cruel (HAC). *Jimenez*, 703 So. 2d at 438 n1. The trial court found one statutory mitigating factor, that the capacity of the Defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. The trial court found two non-statutory mitigating circumstances: Jimenez's potential for rehabilitation, to which the court attributed little weight, and his potential sentence (life with a twenty-five-year minimum mandatory, calculated by the Department as a ninety-nine-year sentence with a release date at age eighty-one) which the court gave great weight.

The Florida Supreme Court affirmed Jimenez's convictions and death sentence in *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997). His sentence became final on May 18, 1998, when this Court denied certiorari. *Jimenez v. Florida*, 523 U.S. 1123 (1998).

On February 1, 2000, Jimenez filed his initial motion for post-conviction relief. That motion was subsequently amended and denied by the state trial court on June 8, 2000. On September 26, 2001, the Florida Supreme Court affirmed the trial court's denial of relief in *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001), *cert. denied*, 535 U.S. 1064 (2002). His state petition for writ of habeas corpus, filed in

the Florida Supreme Court on December 11, 2002, was denied in *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003), on June 10, 2003. A second petition for writ of habeas corpus was filed in the Florida Supreme Court May 26, 2004. The Court denied relief in *Jimenez v. Crosby*, 905 So. 2d 125 (Fla. 2005), on March 18, 2005.

Jimenez also filed his initial federal petition for writ of habeas corpus in the U.S. District Court for the Southern District of Florida on January 20, 2004 and amended it on April 27, 2005. The federal district court dismissed his petition and then denied the amended petition on January 30, 2006. A second federal habeas petition was filed *pro se* on February 28, 2005, and was denied on March 1, 2006. Jimenez sought certificates of appealability [COA] in his 2006 litigation and the Eleventh Circuit Court of Appeals denied the COAs in *Jimenez v. Fla. Dept. of Corrections*, 481 F.3d 1337 (11th Cir.), *cert. denied*, 552 U.S. 1029 (2007).

During that same time-period, Jimenez returned to the state trial court and filed a successive Rule 3.850 motion for post-conviction relief on April 28, 2005. The trial court denied relief on September 15, 2005, and the Florida Supreme Court affirmed the trial court's denial of relief in *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008), *cert. denied*, 557 U.S. 925 (2009).

On November 29, 2010, Jimenez filed another successive motion for post-conviction relief. That motion was denied February 11, 2011. He filed another successive motion in the trial court on March 20, 2013. That motion was denied on

April 24, 2014, and the appeal that followed in the Florida Supreme Court was affirmed in *Jimenez v. State*, 153 So. 3d 906 (Fla. 2014), *cert. denied*, 135 S. Ct. 1712 (2015).

Jimenez sought further successive review in the federal district court in a Rule 60(b) motion (Fed. R. Civ. P. 60(b)), filed May 16, 2014. The federal district court denied the motion June 12, 2014. Jimenez then filed a motion to alter or amend the judgment denying his 60(b) motion, which was denied July 29, 2014, and on August 29, 2014, sought a COA from the district court. On October 28, 2014, the district court denied the COA. He filed his request for a COA in the Eleventh Circuit Court of Appeals on November 17, 2014. That Court denied the COA request May 29, 2015. His certiorari petition to this Court was denied on February 27, 2017, in *Jimenez v. Jones*, 137 S. Ct. 1220 (2017).

On January 11, 2017 (amended November 3, 2017), Jimenez filed a *Hurst v. State*, 202 So. 3d 40, 60 (Fla. 2016), claim in the trial court. Relief was denied on November 16, 2017. An appeal followed in the Florida Supreme Court, which affirmed the trial court's denial of relief on June 28, 2018. *See Jimenez v. State*, 247 So.3d 395 (Fla. 2018) A rehearing motion was filed July 13, 2018, which the Florida Supreme Court struck on July 18, 2018.

Litigation Under the Instant Warrant

On July 18, 2018, Governor Scott signed a death warrant for Jimenez's

execution. (2018 PC 95). On July 19, 2018 the Florida Supreme Court issued a briefing schedule. (2018 PC 86). Jimenez filed his demands for public records on July 20, 2018 and the relevant agencies responded by July 22, 2018. (2018 PC 201-254). A public records hearing was held on July 23, 2018. (2018 PC 255, 785). The circuit court denied most of the requests but granted some requests for documents from the Department of Corrections and FDLE. (2018 PC 366-367). Jimenez filed his successive motion for post-conviction relief on July 24, 2018 (2018 PC 270) and the State responded (2018 PC 379). The circuit court held a case management hearing on July 26, 2018. (2018 PC 843). Jimenez filed additional public records demands on July 27, 2018. (2018 PC 645-676). He then filed a rule 3.800(a) motion to correct his burglary sentence on July 29, 2018. (2018 PC 677). The State responded (2018 PC 697) and the circuit court denied the motion on July 30, 2018 (2018 PC 705). The court also denied the additional public records requests. (2018 PC 708). Jimenez filed a motion for rehearing on July 31, 2018 (2018 PC 772), which was denied (2018 PC 760). The circuit court denied relief on the post-conviction motion on that same day. (2018 PC 761). Jimenez filed a timely notice of appeal to the Florida Supreme Court. (2018 PC 782).

On August 6, 2018, Jimenez filed another successive post-conviction motion, based on information in hand-written notes by the detectives in the original

case. He alleges that the information is novel and supports *Brady*[1] claims. The State filed its response on August 7, 2018 and the lower court held a hearing on August 8, 2018, to hear the motion.

The Florida Supreme Court affirmed the denial of Jimenez's successive post-conviction motions on October 4, 2018, *Jimenez v. State*, ___ So. 3d. ___, 2018 WL 4784203 (Fla. Oct. 4, 2018). Jimenez's petition for writ of certiorari and application for stay of execution from this decision are pending in this Court in Case No. 18-6970 and Application No. 18A606.

On December 10, 2018, Jimenez filed a successive petition for writ of habeas corpus in the United States District Court, Southern District of Florida and on December 11, 2018, filed an application for a stay of execution. The State filed responses to both on December 11, 2018, arguing that he was entitled to resentencing under Florida statutory development of Chapter 2017-1 and a prospective change to the Savings Clause that he insisted would apply to his case. He also argued that his Brady/Giglio claims of newly discovered evidence require his death sentence and convictions to be vacated. The district court, the Honorable Donald Middlebrooks dismissed the petition as unauthorized and denied a stay because Jimenez had not sought permission to file a successive petition from the

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

court of appeals. The court issued its order denying both the successive petition for writ of habeas corpus and the application for stay on December 12, 2018 (Case No. 18-25165-CIV-MIDDLEBROOKS).

On December 12, 2018, Jimenez filed an appeal in the United States Court of Appeals for the Eleventh Circuit. (Case No. 18-15128-P) and subsequently filed his initial brief on December 13, 2018, as well as a motion for stay of execution. Respondent within the hour time frame mandated by the brief scheduling order filed its answer brief. The court issued an order holding that "the district court correctly dismissed Jimenez's first two claims for lack of subject-matter jurisdiction and affirm on the basis of the district court's well-reasoned opinion." *Jimenez v. Sec'y, Florida Dep't of Corrections*, Case No. 18-15128 (11th Cir. Dec. 13, 2018). Jimenez subsequently filed the instant Petition. This Brief in Opposition follows.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because the Eleventh Circuit Properly Affirmed Dismissal of an Unauthorized Successive Habeas Petition as it was required to do under the AEDPA. In any case, even if the underlying petition was authorized, it is clear Jimenez would not be entitled to relief as the *Hurst* and *Brady* claims were meritless and do not conflict with any decision of this Court or involve an important, unsettled question of federal law.

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Sup. Ct. R. 10. Jimenez advances no special or important reason in this case, and none exists. The procedural ruling of the Eleventh Circuit Court of Appeals below was correct and not in conflict with that of any other court of appeals.

This Court recently denied certiorari on Jimenez's *Hurst* related claims on review from the Florida Supreme Court *Jimenez v. Florida*, --- S.Ct. ---- (2018) 2018 WL 4681996 (Dec. 3. 2018). In that petition, Jimenez asked this Court to grant certiorari review to "consider the effect that the Florida Supreme Court's reading of the Florida capital sentencing statute and identifying elements of capital murder has upon Jimenez's death sentence." *See* Petition filed September 23, 2018. This issue should be provided even less traction here, when it was denied below on jurisdictional grounds as an impermissible successive habeas petition filed without authorization from the court of appeals.

Jimenez's claim, even if properly presented in federal court below, would be subject to the stringent requirements of the AEDPA for filing successive petitions. No decision from this Court has held *Hurst* applies retroactively. The Florida Supreme Court's denial of the retroactive application of *Hurst* to Jimenez's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court.

As will be shown, there is no conflict in the law that would warrant certiorari review pertaining to the issue of the Court of Appeals' denial of his motion for stay of execution and application to file a successive habeas petition. Second, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Jimenez*, 247 So.3d 395, in which the court determined that Petitioner was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Third, the *Brady* claim[2] does not warrant certiorari review as there is no conflict in federal law and the court of appeals properly affirmed the dismissal where it found that *Panetti* does not extend to newly discovered *Brady* claims and the *Brady*

[2] Currently, Jimenez's *Brady* claims is also pending a decision from this Court on certiorari review from the Florida Supreme Court's denial of his postconviction motion in Florida Supreme Court Case number SC18-1321 (filed in this Court under case number USSC 18-6970).

claims themselves are meritless. As no compelling reason for review has been offered by Jimenez, certiorari should be denied. Sup. Ct. R. 10.

ARGUMENT

> The Eleventh Circuit Court Of Appeals Properly Affirmed The District Court's Dismissal And Properly Denied A Stay Of Execution Because Jimenez Filed His Successive Habeas Petition In The District Court Without First Obtaining The Requisite Authorization From The Court Of Appeals. Further The Underlying Constitutional Claims Were Resolved Consistent With This Court's Precedent And Do Not Present Either An Important Or Unsettled Question Of Federal Law For This Court's Review**.**

The decision below does not conflict with any of this Court's precedent or present an important or unsettled question of law for this Court's review.

A. There Is No Conflict In The Law Where Federal Courts Agree that *Hurst* Does Not Meet AEDPA'S Requirement For Filing Successive Petitions.

Jimenez's appeal to the federal courts for relief in the successive habeas context faces the rather imposing burden of the AEDPA. The lower courts properly considered this a successive petition. Jimenez's claim was squarely based upon a change in the law which falls within the construct of 28 U.S.C.A. § 2244 (b)(1)(2)(A): "the applicant shows that the claim relies on a new rule of constitutional law, made **retroactive** to cases on collateral review by the Supreme Court, that was previously unavailable" (emphasis added).

"No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable." *See Lambrix v. Sec'y*, DOC, 872 F.3d 1170, 1182 (11th

Cir. 2017), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 312 (2017); *see also In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) ("But even if we assume that *Hurst* announced "a new rule of constitutional law," the Supreme Court has not "made [*Hurst*] retroactive to cases on collateral review.") (quoting *Tyler v. Cain*, 533 U.S. 656, 662–63, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("The Supreme Court has not held that its decision in *Hurst* is retroactively applicable to cases on collateral review."). As the Eighth Circuit recently explained in denying permission to file a successive habeas petition concerning *Hurst*:

> In Case No. 17-1060, Rhines applies for authorization to file a second or successive habeas petition arguing that "South Dakota's sentencing statute is likely unconstitutional" because, contrary to the U.S. Supreme Court's decision in *Hurst v. Florida*, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), the statute "does not require that the jury find each fact necessary to impose a death sentence unanimously and beyond a reasonable doubt." See 28 U.S.C. § 2244(b)(3). We deny the Application. Leave to file a second or successive habeas petition may be granted if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). "[A] new rule is not 'made retroactive' unless the Supreme Court holds it to be retroactive." *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014), citing *Tyler v. Cain*, 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). The opinion in *Hurst* made no mention of retroactivity, and no subsequent Supreme Court decision has made Hurst retroactive.

Rhines v. Young, 899 F.3d 482, 499 (8th Cir. 2018).

As such, the Eleventh Circuit Court of Appeals correctly affirmed the dismissal of the successive habeas petition. Specifically, "all three of Jimenez's claims qualify as "second or successive" under 28 U.S.C. § 2244(b), as we have construed that term in binding precedent. *See Jimenez v. Sec'y Dep't of Corr.*, -- F.3d. --- (citing *Tompkins v. Sec'y, Dep't of Corr*., 557 F.3d 1257, 1260 (11th Cir. 2009); *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018)). There is no conflict among the courts of appeals on this question.

I. There Is No Underlying Constitutional Violation and The State Court Retroactivity Ruling Rests On Independent And Adequate State Grounds.

Assuming for a moment Jimenez can overcome the procedural hurdle presented by a successive petition under the AEDPA, Jimenez has no chance of success on the merits on the merits. As this Court is well aware, a federal court may not grant a state prisoner's habeas application unless the relevant state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "the state court's determination of facts was unreasonable in light of the evidence." *See Woodford v. Visciotti*, 537 U.S. 19 (2002) and *Yarborough v. Gentry*, 540 U.S. 1 (2003) (discussing and applying the AEDPA).

The Florida Supreme Court's ruling on retroactivity in this case does not violate this Court's relevant precedent. *Ring v. Arizona*, 536 U.S. 584 (2002).

Perhaps recognizing that since this Court has decided the retroactivity issue in a manner that forecloses the possibility of relief, Jimenez attempts to avoid this result by invoking additional constitutional claims based on state law. However, state statutory law and interpretations of state law do not implicate the denial of a federal constitutional right and certainly do not warrant this Court's exercise of certiorari jurisdiction. *See e.g. Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (noting that "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern []" and that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. Petitioner's contemporaneous burglary conviction, and prior violent felony conviction, constitute aggravators under well-established Florida law. These aggravators were sufficient to meet the Sixth Amendment's fact-finding requirement under this Court's established precedent.[3] *See Jenkins v.*

[3] § 921.141(6)((listing prior violent felony and murder committed in the course of a burglary as aggravators).

Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the Constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy."); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). There was no underlying federal constitutional violation in this case.

Respondent would note that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g.*, *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 17-8540, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 17-

8134, 2018 WL 1367892 (June 18, 2018). Most notably, as mentioned above Petitioner's petition for certiorari filed just in September was denied by this Court December 3, 2018. *Jimenez v. Florida*, --- S.Ct. ---- (2018) 2018 WL 4681996 (Dec. 3. 2018). Petitioner offers no persuasive, much less compelling reasons, for this Court to grant review of his case at this late juncture, particularly where it faces the considerable procedural hurdle of a successive habeas petition and the deference to state court ruling it is due under the AEDPA.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under the state law *Witt* standard is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below). If a state court's decision

is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041. Because the Florida Supreme Court's retroactive application of *Hurst* in Petitioner's case is based on adequate and independent state grounds, certiorari review should be denied.

The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). As such, the death penalty is limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper*, 543 U.S. at 568. Petitioner's death sentence was imposed in accordance with all applicable constitutional principles at the time it was imposed.[4]

[4] Moreover, *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624. *See also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, the jury recommendation of death was **made unanimously by the jury**: The aggravating circumstances found by the trial court and affirmed by the Florida Supreme Court on appeal were uncontestable (as unanimously found by the jury at the guilt phase of this case) and the jury recommended death 12-0. See *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), *cert. denied*, 137 S. Ct. 2218 (2017) (a jury's unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.").

The retroactivity ruling below does not conflict with any of this Court's precedent or present this Court with a significant or important unsettled question of law. Accordingly, certiorari should be denied.

Jimenez's argument that he was denied his right to have a jury find beyond a reasonable doubt the "critical elements" that subjected him to the death penalty, is plainly meritless. Notwithstanding that the death recommendation in this case was unanimous, his argument ignores Florida's longstanding practice of using the beyond-a-reasonable-doubt standard of proof for proving aggravating factors in Florida. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995); *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986). *Hurst* did nothing to change this standard. Furthermore, neither *Hurst v. Florida* nor *Hurst v. State* changed the standard of proof as to any required finding in Florida's capital sentencing proceedings. Rather, both *Hurst v. Florida* and *Hurst v. State* addressed who makes the findings — the jury versus the judge — not what standard of proof is used.

Jimenez's argument that his sentence somehow violates the Eighth Amendment is plainly meritless. To the extent Jimenez suggests that jury sentencing is now required under federal law, this is not the case. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence

of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Constitution provides a right to **trial** by jury, not to **sentencing** by jury.

Jimenez's death sentence is neither unfair nor unreliable because the judge imposed the sentence in accordance with the law existing at the time of his trial. Petitioner cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Certainly, other than speculation, Jimenez has neither identified nor established any particular lack of reliability in the proceedings used to impose his death sentence. *See Hughes v. State*, 901 So. 2d 837, 844 (Fla. 2005) (holding that *Apprendi* is not retroactive and noting that "neither the accuracy of convictions nor of sentences imposed and final before *Apprendi* issued is seriously impugned"; *Rhoades v. State*, 233 P. 3d 61, 70-71 (2010) (holding that Ring is not retroactive after conducting its own independent *Teague* analysis and observing, as this Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy.") Just like

Ring did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst.* As this Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Thus, because the accuracy of Jimenez's death sentence is not at issue, fairness does not demand retroactive application of *Hurst.*

II. Jimenez's *Brady/Giglio* Claim

A. The Procedural Ruling Below Does Not Conflict With Any Of This Court's Precedent Or Present An Important Or Unsettled Question Of Law.

The district court below properly dismissed the successive habeas petition because there was no prior authorization to pursue this claim from the Eleventh Circuit Court of Appeals. As Jimenez had a prior habeas petition adjudicated on the merits, Petitioner must have obtained authorization from the court of appeals to pursue his *Brady*/*Giglio* claims and only upon a prima facie showing of relief. § 2244(b)(3)(C). 28 U.S.C. § 2244(b)(2) provides that the "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Jimenez did not even attempt to meet that burden. Reading the rule as Jimenez suggests and expanding *Panetti* beyond its recognized bounds would

effectively overturn the plain statutory language governing successive habeas petitions. Jimenez's reliance *of Pannetti v. Quarterman*, 551 U.S. 930 (2007) is misplaced.

In *Panetti*, the Supreme Court held that the statutory bar on second or successive petitions does not apply to claims under *Ford v. Wainwright*, 477 U.S. 399, 410(986), which prohibited the execution of insane prisoners. Because an inmate's competency to be executed cannot be determined until the execution is imminent, the Court held that the petition was functionally a first petition because the claim was not ripe until the warrant was signed. Moreover, the claim was based on changing factual circumstance, i.e. the inmate's mental condition, which could not properly be assessed until the close to the execution date.

Additionally, Jimenez relies on *In re Jones*, 652 F.3d 603 (6th Cir. 2010), to argue that the gatekeeping procedures of 28 U.S.C. § 2244 do not apply to his habeas petition. *See* Petition at 22. In *Jones*, the court reiterated that the gatekeeping procedures are not applicable where a habeas petitioner asserts claims whose predicates arose after the filing of the original petition. There, the petitioner raised an ex post facto challenge to an amendment to Michigan's parole system which occurred two years after Jones filed his initial habeas petition. *Id.* at 605. The *Jones* court held:

> Like the *Ford* claims at issue in *Panetti* and *Martinez–Villareal*, Jones's ex post facto claim was unripe when his initial petition was filed—the events giving rise to the claim had not yet occurred. And, as in *Panetti*, no useful purpose would be served by requiring prisoners to file ex post facto claims in their initial petition as a matter of course, in order to leave open the chance of reviving their challenges in the event that subsequent changes to the state's parole system create an ex post facto violation. As a result, we conclude that Jones's ex post facto claim is not properly classified as "second or successive," and thus does not require our authorization to go forward in the district court. In so holding, we join several other circuits that have reached the closely related conclusion that § 2244(b)'s limitations on second or successive petitions do not apply to a numerically second petition challenging a parole determination or disciplinary proceeding that occurred after the prisoner's initial petition was filed. *See In re Cain*, 137 F.3d 234, 236–37 (5th Cir. 1998) (challenge to disciplinary revocation of good-time credits); Crouch v. *Norris*, 251 F.3d 720, 723–24 (8th Cir. 2001) (challenge to parole determination); *Hill v. Alaska*, 297 F.3d 895, 897–99 (9th Cir.2002) (challenge to parole determination); *see also Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) (noting that a challenge to a parole determination would not constitute a "second or successive" petition under § 2244 if "the claim had not arisen or could not have been raised at the time of the prior petition," but holding prisoner's claim barred because the parole board had rendered an identical determination before his initial petition was filed).

In re Jones, 652 F.3d 603, 605–06 (6th Cir. 2010).

Moreover, as was noted in the concurrence opinion by the Honorable Judges Carnes and Tjoflat:

> We write separately to express our continued agreement with this Court's decision in *Tompkins* that *Brady* and *Giglio* claims are subject to the second or successive application requirements set out in 28 U.S.C. § 2244(b). *See Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009); *see also Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018) (following the

> *Tompkins* decision). There is no disagreement that *Tompkins* is binding precedent in this circuit. Nor is there any circuit split over the issue of whether *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842 (2007) made the second or successive application requirements inapplicable to *Brady* and *Giglio* claims. All three other circuits that have decided the issue since Panetti agree with ours that the second or successive application requirements do apply to *Brady* and *Giglio* claims. *See Blackman v. Davis*, No. 16-11820, —F.3d —, 2018 WL 6191348, at *5 (5th Cir. Nov. 28, 2018) (stating that petitioner's contention that *Brady* and *Giglio* claims are not subject to § 2244(b)(2)(B)'s second or successive requirements has been "rejected conclusively" by the Fifth Circuit); In re Wogenstahl, 902 F.3d 621, 627–28 (6th Cir. 2018) (holding that petitioner's *Brady* claims were subject to § 2244(b)(2)(B)'s second or successive requirements because the claims were "not unripe at the time [the petitioner] filed his initial petition" even though the petitioner "was unaware" of the facts giving rise to the claims at that time); *Brown v. Muniz*, 889 F.3d 661, 668–73 (9th Cir. 2018) (holding that *Panetti*'s reasoning does not extend to *Brady* claims and that they are subject to AEDPA's second or successive requirements because "the factual predicate supporting a *Brady* claim existed at the time of the first habeas petition") (quotation marks and brackets omitted); *see also In re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012) (declining to certify second or successive *Brady* and *Giglio* claims under § 2244 because they did not meet the requirements of § 2255(h)); *Evans v. Smith*, 220 F.3d 306, 324 (4th Cir. 2000) (concluding pre-*Panetti* that *Brady* claims are subject to § 2244(b)(2)(B)'s second or successive application requirements and explaining that if they were not "AEDPA's purpose of achieving timely, final resolutions of claims in the interests of justice and out of respect for state judicial processes would surely be eroded under such a regime").

As the Eleventh Circuit Court of Appeals well noted, Jimenez's appeal to the federal courts for relief in the habeas context faces the rather imposing burden of

the AEDPA. Under Brown v. Muniz, Jimenez's claim that he could be unaware of the facts of his own statement made to the police is a completely untenable argument to be considered an "actionable *Brady* violation" in the context of Judge Rosenbaum's concurring opinion. Here, it is clear through the extensive state litgation that *Tompkins* would still prevail Jimenez would have still not been able to show due diligence or an actionable *Brady* violation, given the specific facts of his *Brady/ Giglio* claims arising from his own statements to the police. Therefore, certiorari review is not warranted.

a. Even if Jimenez were to get through all of the procedural hurdles, certiorari review is not warranted when the Brady/Giglio claim was denied on independent and adequate state grounds.

Aside from the procedural hurdles faced by a successive petition under the AEDPA, this case would also be an inappropriate vehicle for certiorari review as the underlying Brady/Giglio claims were procedurally barred under established Florida law. As this is an adequate and independent state law ground, the petition should be denied. This Court has consistently adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) ("We in fact lack jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory"); *Sochor v. Florida*,

504 U.S. 527, 533 (1992) (stating that "this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground"); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").

The Florida Supreme Court specifically found each of the *Brady* or *Giglio* claims to be procedurally barred under independent state law grounds. This Court has repeatedly recognized that where a state court judgement rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010). The Florida Supreme Court found the claim raised by Petitioner untimely and procedurally barred from review in Petitioner's successive motion for post-conviction relief. For that reason alone,

certiorari review should be denied.

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DENIAL OF STAY

For the reasons set out above, Jimenez has not presented a colorable claim for relief, and, because that is so, no stay of execution is justified in this case. *See Bowersox v. Williams*, 517 U.S. 345 (1996); *Delo v. Stokes*, 495 U.S. 320 (1990); *Antone v. Dugger*, 465 U.S. 200 (1984). Moreover, he cannot demonstrate a substantial denial of a constitutional right that would be mooted by his execution. *Barefoot v. Estelle*, 463 U.S. 880 (1983). As this Court noted in *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006), "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Here, the State's strong interest in the timely enforcement of a sentence is not outweighed by the unlikely possibility that Jimenez's petition for certiorari will be granted by this Court. The equities in this case tilt decidedly against Jimenez in favor of the State and the victim's family members. Accordingly, the State respectfully requests that this Court deny the instant petition and application for a stay of execution.

Entry of a stay to review a jurisdictional question from the district court on an issue with no underlying merit, renders obvious harm to the State, the victims' families, and, their interest in finality. The stay here is most certainly not in the public interest, with the public having borne the cost and emotional burden of extensive litigation over the course of more than twenty years. Further, any stay

entered in this case would be inappropriate where Petitioner has no "substantial likelihood of success" on the merits. More importantly, however, the last-minute nature of Jimenez's filing is of his own making, and he should not profit from his dilatory and abusive strategy. His request for a stay should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari and the application for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 13th day of December 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Martin J. McClain, Esquire, McClain and McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064, martymcclain@comcast.net. I further certify that all parties required to be served have been served.

/s/ Lisa Marie Lerner
/s/ Lisa-Marie Lerner

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