DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

BRYAN FREDRICK JENNINGS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED--CAPITAL CASE

Context

Under Florida law, post conviction relief is available when it is shown that: 1) newly discovered evidence exists that was not previously available despite the defendant's exercise of due diligence, and 2) it is probable that at a new trial and/or a new penalty phase that if the new evidence is introduced either the result will be an acquittal or at least a less severe sentence.[1] To decide whether a new trial or resentencing should be ordered, the reviewing court must look to whether the new trial or resentencing, if granted, would probably produce a different outcome. *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994)("Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted."). When a resentencing is sought on a newly discovered evidence claim, the court looks to see whether it is likely that the outcome of a resentencing would produce a less severe sentence, i.e. here, a life sentence.[2]

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[1]*See Johnson v. Mississippi*, 486 U.S. 578, 586-87 (1988)("A rule that regularly gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.").

[2]In *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), the Florida Supreme Court found a co-defendant's life sentence was newly discovered evidence that required Scott's death sentence to be vacated and a life sentence imposed because the outcome of a direct appeal following a resentencing would result in a sentence

(continued...)

In *Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016)("*Hurst v. State*"), the Florida Supreme Court held that a death can no longer be imposed without a jury's unanimous death recommendation which can only be returned if the jury unanimously finds the existence of the statutorily identified facts necessary to give the presiding judge the sentencing discretion to impose a death sentence:

> **[A]ll the findings necessary for imposition of a death sentence are "elements"** that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must **unanimously and expressly find all the aggravating factors** that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient** to impose death, **unanimously find that the aggravating factors outweigh** the mitigating circumstances, and **unanimously recommend a sentence of death**. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

(Emphasis added). *See Foster v. State*, 258 So.3d 1248, 1251 (Fla. 2018) ("section 921.141, Florida Statutes, which was revised to incorporate the *Hurst* requirements; and chapter 2017-1, Laws of Florida, which amended section 921.141 to require that a jury's recommendation of death be unanimous.").

In *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), the Florida Supreme Court concluded that *Hurst v. State* was

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[2](...continued)
reduction and the imposition of a life sentence.

retroactive to criminal cases the death sentence was not final before June 24, 2002.

In any case in which a death sentence was imposed and was final prior to June 24, 2002, the analysis of a newly discovered claim requires consideration of the likely outcome if the death sentence is vacated a new penalty phase ordered. Of course if a new penalty phase were to be ordered, then the death sentence imposed would no longer be final. Accordingly, *Hurst v. State* would be the governing law that would govern at the future resentencing.

Questions To Be Resolved

1. Whether the Eighth and Fourteenth Amendments require the law of *Hurst v. State* to be factored into the analysis of the likelihood of a less severe sentence at a new penalty phase at which the newly discovered evidence is introduced?

2. Whether the Eighth and Fourteenth Amendments require the law of *Hurst v. Florida* to be factored into the analysis of the likelihood of a less severe sentence at a new penalty phase at which the newly discovered evidence is introduce?

3. When it is probable that a death sentence would not be imposed if a new penalty phase were ordered, and it is shown that materially inaccurate evidence was before the jury that returned an 11-1 death recommendation, and it is shown that favorable evidence was withheld by the State, and the law has changed to impose a heavier burden on the State seeking the imposition of a death sentence, is the Eighth Amendment demand that death sentences be reliable violated?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

DOCKET NO. _____

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Petitioner, **BRYAN FREDRICK JENNINGS**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court issued on October 4, 2018.

CITATION TO OPINION BELOW

The Florida Supreme Court's opinion appears at *Jennings v. State*, _ So.3d _, 2018 WL 4784074 (Fla. Oct. 4, 2018). The opinion is attached to this Petition as Attachment A.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court entered its opinion on October 4, 2018 attached as Attachment A.

Mr. Jennings filed an application for an extension of his time to file this petition for a writ of certiorari. On January 3, 2019, Justice Thomas granted the application and extended the time for filing this petition until Sunday, March 3, 2019. The extension of time is attached as Attachment B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mr. Jennings is under a sentence of death. He was indicted on May 16, 1979, and charged with first degree murder as to a homicide that had occurred on May 11, 1979, in Brevard County.[3]

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[3]The indictment charged Mr. Jennings with three counts of first degree murder even though there was only one victim. This was accomplished by charging one count of first degree

(continued...)

On June 28, 1979, the State disclosed two jailhouse informants (Clarence Muszynski and Allen Kruger) as witnesses for the State. Even though the same public defender's office that represented Jennings also represented both Muszynski and Kruger, the trial judge refused to find the existence of a conflict and required the public defender's office to continue as Jennings' counsel. When the State called Kruger as a witness, Jennings' counsel refused to cross-examine Kruger due to his conflict of interest.[4] After Jennings was convicted and a death sentence imposed, the Florida Supreme Court reversed and ordered a new trial due to counsel's refusal to cross-examine Kruger. *Jennings v. State*, 413 So. 2d 24 (Fla. 1982).[5]

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[3](...continued)
premeditated murder, one count of first degree felony murder with the felony being kidnapping and one count of first degree murder with the felony being sexual battery. Charging more than one count of first degree murder in cases in which there was only one homicide victim was a practice that the Brevard County State Attorney engaged in the late 1970s and early 1980s. *See Goss v. State*, 398 So. 2d 998, 999 (Fla. 5th DCA 1981) ("*Sua sponte*, we find fundamental error in the conviction for the felony murder count, which issue we address notwithstanding appellant's failure to raise it either in the trial court or on appeal. *** [S]ince there was only one homicide here, there could only be one murder conviction, so appellant could not be convicted of both premeditated murder and felony murder."); *Bean v. State*, 469 So. 2d 768, 769 (Fla. 5th DCA 1984) ("one homicide can support only one murder conviction.").

[4]The State did not call Muszynski to testify at the first trial.

[5]Even though the State introduced a statement that Jennings gave to the police, the Florida Supreme Court found that "Kruger's testimony was critical" because it was the only direct evidence of premeditation. *Jennings I*, 413 So. 2d at 26 n.1 ("There is evidence that the defendant had an unstable mental condition; his statements to the police disavow any intention to
(continued...)

At the conclusion of his second trial, Jennings was again convicted and again sentenced to death. This conviction was overturned and a new trial ordered because Jennings' statement was obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Jennings v. State*, 473 So. 2d 204 (Fla. 1985).[6]

For Jennings's third trial occurred in March of 1986, venue was move to Bay County, Florida. Because Kruger had died, his testimony from the second trial was read to the jury. In addition, the State called Muszynski to testify. He had not been called at either the first or second trial.[7] Muszynski's testimony was the basis for two aggravating circumstances found by the judge. His testimony was relied upon by the State's mental health experts to opine that mitigating circumstances based upon mental impairment did not exist. The third trial resulted in a conviction, an 11-1 death recommendation, and a sentence of

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[5](...continued)
commit murder.").

[6]As the Florida Supreme Court had noted in the first direct appeal, in the statement taken in violation of *Edwards v. Arizona* Jennings had disavowed "any intention to commit murder." *Jennings I*, 413 So. 2d at 26 n.1 ("There is evidence that the defendant had an unstable mental condition; his statements to the police disavow any intention to commit murder.").

[7]A confidential pre-sentence report prepared in August of 1979 in Muszynski's first degree murder was not disclosed to Jennings. The defense did not know that at the time he claimed Jennings had confessed the murder, the State was seeking a judicial override of the jury's life recommendation in Muszynski's case and was charging Muszynski's wife. In a deposition, she contradicted the sworn statement she gave to get a deal in which she said that Muszynski had told her in advance that he was going to kill his victim.

death. The Florida Supreme Court affirmed in Jennings' third direct appeal. *Jennings v. State*, 512 So. 2d 169 (Fla. 1987).

After a death warrant had been signed in 1989, Jennings filed a motion seeking post conviction relief on October 23, 1989. The motion included a *Brady* claim based on an undisclosed taped interview of Judy Slocum, who described Jennings's intoxication in the early morning hours of May 11, 1979. Jennings also alleged a *Brady* violation occurred when the State failed to disclose impeachment evidence regarding a letter Muszynski wrote to the State Attorney in 1985 after he was contacted about testifying at Jennings's third trial. Jennings's motion also pled ineffective assistance of counsel at the 1986 trial. He argued that counsel's performance was deficient when he failed to discover and present evidence from Kruger's court file showing that less than two months before his first statement to the police regarding statements made by Jennings, Kruger had challenged his own mental competency due to "delusional thought patterns."

Ineffective assistance was also asserted as to the penalty phase. Jennings contended that counsel failed to conduct a reasonable investigation of the available mitigating evidence, and that he unreasonably failed to present the available mitigating evidence.

In response, the State conceded that a *Brady* violation had occurred when it failed to disclose the Slocum tape. However, it argued that the violation was harmless. The circuit court agreed and summarily denied relief. Jennings appealed, and the Florida

Supreme Court issued a stay of execution. After briefing, the court affirmed the denial of the motion to vacate except as to Jennings' claim that he had not received all the public records to which he was entitled. The court remanded for disclosure of those records. *Jennings v. State*, 583 So.2d 316, 319 (Fla. 1991).

After the disclosure of additional records, Jennings filed an amended motion for post conviction relief. An evidentiary hearing was held after which the circuit court denied relief. On appeal, the Florida Supreme Court affirmed. *Jennings v. State*, 782 So. 2d 853 (Fla. 2001).

On November 29, 2010, Jennings filed a 3.851 motion premised upon *Porter v. McCollum*, 558 U.S. 30 (2009). The circuit court summarily denied, and the Florida Supreme Court affirmed on appeal. *Jennings v. State*, 91 So. 3d 132 (Fla. 2012). However, the court gave Jennings 30 days from the date of its order affirming to file another 3.851 motion based upon new evidence, *nunc pro tunc* to the date that he had initially tried to present his claims arising from the new evidence.

Within the allotted 30 days, Jennings filed a motion for post conviction relief based on the new evidence, an affidavit from Muszynski and the previously undisclosed documentary evidence Muszynski was helping Jennings locate.

Based on the Muszynski's affidavit and the documentary evidence that it helped Jennings find, the motion for post conviction relief included a newly discovered evidence claim under *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Under the *Jones* standard, a defendant is entitled to post conviction relief if he

would probably receive a less severe sentence at a retrial or new penalty phase. Unlike the prejudice analyses of claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984) which look to the effect of the evidence in question on the outcome at the trial or the penalty phase that occurred in the past, the second prong of a newly discovered evidence claim looks forward to what will more likely than not occur at a new trial or resentencing.[8] In *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013), the Florida Supreme Court explained that the second prong of the newly discovered evidence "standard focuses on **the likely result that would occur during a new trial** with all admissible evidence at the new trial being relevant to that analysis." (emphasis added).

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[8] The standard for measuring a newly discovered evidence claim was adopted in *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991), when this Court receded from an earlier stricter standard:

> Upon consideration, however, we have now concluded that the *Hallman* standard is simply too strict. The standard is almost impossible to meet and **runs the risk of thwarting justice in a given case**. Thus, we hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The **same standard would be applicable if the issue were whether a life or a death sentence** should have been imposed.

(emphasis added). This Court's formulation of the standard was prompted by concerns that the older stricter standard risked thwarting justice. The *Jones* standard was designed to facilitate the interests of justice and insure that criminal proceedings produce reliable outcomes. This is in keeping with *Johnson v. Mississippi*, 486 U.S. at 586-87 ("A rule that regularly gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. [Citations] To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.").

In *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), the Florida Supreme Court was referenced repeatedly:

> In light of the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through Hildwin's postconviction proceedings, we conclude that the totality of the evidence is of "such nature that it would probably produce **an acquittal on retrial**" because the newly discovered DNA evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."

Hildwin, 141 So. 3d at 1181, quoting *Jones v. State*, 709 So. 2d 512, 521, 526 (Fla. 1998) (emphasis added).

> Based on the standard set forth in *Jones II*, the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that **could be introduced at a new trial**.

Id., 141 So. 3d at 1184 (emphasis added).

> In conclusion, the postconviction court erred in holding that the results from the DNA testing would be inadmissible **at a retrial**. This evidence cannot be excluded merely because the new scientific evidence is contrary to the scientific evidence that the State relied upon in order to secure a conviction at the original trial. Questions surrounding the materiality of the evidence and the weight to be given such evidence are for the jury.

Id., 141 So. 3d at 1187 (emphasis added).

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that **could be introduced at a new trial**, and conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case."

Id., 141 So. 3d at 1187-88, quoting *Swafford v. State*, 125 So. 3d at 776 (emphasis added).

> The newly discovered evidence, when considered together with all other admissible evidence, must be of such nature that it would probably produce *an acquittal on*

retrial . . . .

Id., 141 So. 3d at 1188 (emphasis added).

> The dissent ignores the disputed evidence, does not acknowledge the impact that erroneous scientific evidence would have on the jury, and avoids reviewing any of the evidence discovered after trial—evidence that **would be admissible at a retrial and must be considered** to obtain a full picture of the case.

Id., 141 So. 3d at 1192 (emphasis added).

In *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994), the Florida Supreme Court explained:

> Only when it appears that, **on a new trial**, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

(emphasis added).

When a newly discovered evidence claim seeks to vacate a death sentence in a capital case, the question to be answered is whether it is probable that a new penalty phase would yield a less severe sentence, i.e. a life sentence. *Johnston v. State*, 27 So. 3d 11, 18-19 (Fla. 2010). *See Bolin v. State*, 184 So. 3d 492, 498 (Fla. 2015) ("If, as here, the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial."); *Melton v. State*, 193 So. 3d at 886 ("it is improbable that Melton would receive a life sentence").

The circuit court held an evidentiary hearing and then denied Jennings's motion for post conviction relief. The Florida Supreme Court affirmed on appeal. *Jennings v. State*, 192 So. 3d 38 (Table)(Fla. 2015). Jennings filed a motion for rehearing. Two days before the Florida Supreme Court denied the rehearing

motion, this Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016). Thus, *Hurst v. Florida* was the law before the denial of Jennings's newly discovered evidence claim became final.

On March 29, 2016, Jennings filed a motion to recall so that the effect of *Hurst* on the analysis of his newly discovered evidence claim could be briefed. The Florida Supreme Court denied the motion to recall the mandate on March 29, 2016.

Jennings then filed a successive Rule 3.851 motion on October 20, 2016. It presented three claims for relief. Claim I rested on the Sixth Amendment. *See Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the Eighth Amendment and the Florida Constitution. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (a jury's unanimous death recommendation was necessary to authorize a death sentence). Claim III asserted that the Florida Supreme Court's rejection of Jennings's newly discovered evidence had to be revisited because the court had failed to include in its analysis the law that would govern at a resentencing. In light of *Hurst v. State*, the State would be required to prove the existence of the statutorily identified facts beyond a reasonable doubt to the satisfaction of a unanimous jury before a judge would have the discretion to impose a death sentence.

The circuit court denied the motion to vacate and Jennings appealed to the Florida Supreme Court. Jennings was required to show cause as to why the denial of his motion should not be affirmed on the basis of the Florida Supreme Court's ruling in *Hitchcock v. State*, 226 So.2d 216 (Fla. 2017). After, Jennings filed a response to the show cause order and argued that

Hitchcock did not address the issues that he wished to present. Jennings specifically argued that the question of whether *Hurst v. State* should be factored into the analysis of whether it was probable that Jennings would receive a less severe sentence if a new penalty phase was ordered on his newly discovered evidence claim.

On January 18, 2018, the Florida Supreme Court issued an order granting Jennings the opportunity to submit briefing on his appeal. Thereafter he filed an initial brief; and after the State filed an answer brief, Jennings filed a reply brief.

On October 4, 2018, the Florida Supreme Court issued an opinion affirming the denial of the motion to vacate. *Jennings v. State*, _ So.3d _, 2018 WL 4784074 (Fla. 2018). In its opinion, the Florida Supreme Court did not specifically address Jennings's argument that *Hurst v. State* had to be part of the analysis of whether the newly discovered evidence would probably result in a less severe sentence if a new penalty phase were ordered.

The Florida Supreme Court simply said that "*Hurst* does not apply retroactively to Jennings' sentence of death." *Jennings v. State*, 2018 WL 4784074 at *1.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO CONSIDER WHETHER THE REFUSAL TO CONSIDER THE LAW THAT WOULD GOVERN A RESENTENCING WHEN EVALUATING THE PROBABILITY THAT MR. JENNINGS WOULD RECEIVE A LESS SEVERE SENTENCE AT A RESENTENCING INFECTED THE PROCEEDINGS WITH UNRELIBILITY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PRINCIPLES.

As this Court explained in *Johnson v. Mississippi*, a rule that permits a capital defendant to obtain sentencing relief when new evidence shows that the jury heard "evidence that has been revealed to be materially inaccurate" comports with the Eighth Amendment.[8] *Johnson v. Mississippi*, 486 U.S. at 590. Such a rule "reduces the risk that [a death] sentence will be imposed arbitrarily." *Id.* at 587. Permitting such claims reduced the risk of the arbitrary imposition of a death sentence:

> A rule that regularly gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. Cf. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). **To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.**

Johnson v. Mississippi, 486 U.S. at 586-87 (emphasis added).

At issue is what consideration the constitution requires to be given to the changes in Florida law and the imposition of a greater burden on the State when evaluating a newly discovered evidence claim. Florida law provides that the analysis looks to the likelihood that a less severe sentence will be imposed if a new penalty phase is ordered.

If a resentencing is ordered, then Jennings' death sentence will no longer be final prior to June 24, 2002, and that means that *Hurst v. State* and *Hurst v. Florida* will govern at the new penalty phase. Yet, because currently Jennings' death sentence was final prior to June 24, 2002, the Florida Supreme Court says that *Hurst v. Florida* and *Hurst v. State* do not apply to Jennings' case and do not get considered when analyzing the probability of a less severe sentence at a penalty phase proceeding that would be governed by *Hurst v. Florida* and *Hurst v. State.*

At no time did the State dispute that if a new penalty phase if held tomorrow, Jennings would very likely receive a life sentence. For that matter the Florida Supreme Court has not disputed that fact either. It refused to address the fact that at a future penalty phase proceeding, the State will have to prove the existence of statutorily identified facts beyond a reasonable doubt to the satisfaction of a unanimous jury. The Florida Supreme Court's position is that because Jennings currently has a death sentence that was final before June 24, 2002, he cannot cite, talk about, or be heard regarding the fact if his death sentence is vacated and a new penalty phase ordered, *Hurst v. State* and *Hurst v. Florida* will govern the proceeding.

The Florida Supreme Court's position shows that it is more concerned with keeping old death sentences intact than it is concerned for the obvious unreliability of Jennings's death sentence. There is no question that the jury that returned an 11-1 death recommendation heard materially inaccurate testimony

regarding the jeopardy Muszynski was facing when he claimed Jennings confessed to him.

Even though Muszynski's jury had recommended a life sentence a week or two before he claimed Jennings confessed to him, the State was going to seek to have the judge override the life recommendation and impose a death sentence. These facts were not disclosed to Jennings or his jury.

After the life recommendation was returned in Muszynski's case, one of the first steps taken by the State was to charge his wife with perjury. She had given a sworn statement that Muszynski told her of his intent to kill the victim, thus establishing premeditation, and the State had agreed to not charge her as an accessory in exchange for her cooperation. When she gave a deposition shortly before Muszynski's trial and refuted her earlier sworn statement, it undercut the State's ability to prove premeditation and convince the jury to return a death recommendation. Charging her with perjury was a way to try to get Mrs. Muszynski to flip back and provide a basis for the judge to override the jury's life recommendation. Jennings knew nothing about this. All that Jennings's jury was told by Muszynski was that he came forward because of his outrage over Jennings's crime.

Moreover, Muszynski has now testified that he lied at Jennings' trial. At a new penalty phase, Muszynski's testimony will be readily impeached and will not support the two aggravators, nor rebut mitigators.

The Florida Supreme Court's refusal to address Jennings's

actual claim and/or his arguments based on the Eighth and Fourteenth Amendments, show why certiorari review is warranted. The Florida Supreme Court has made it clear that it is done with reviewing anything that it may be a *Hurst* issue.

When one actually looks at what the Florida legislature has done and how the Florida Supreme Court has ruled in post-*Hurst* cases, there are inconsistencies in logic. There is a failure to come to grips with how the Florida Supreme Court has failed to recognize the difference between procedural rules and substantive law that defines criminal offenses by identifying their elements. Confusing what is procedural and what is substantive law has injected a high dosage of unreliability along with a couple of arbitrary rulings into capital cases in Florida, which will continue to fester and grow until this Court has to step in as it has had to do before.

It falls to this Court to conduct a principled analysis of the due process implications of the Florida Supreme Court's ruling in Petitioner's case. There is no logic to the Florida Supreme Court's ruling. Certiorari review is warranted.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by electronic service to Doris Meacham, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 4th of March, 2019.

/s/ Martin J. McClain
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ATTACHMENT A

Supreme Court of Florida

No. SC17-500

BRYAN FREDRICK JENNINGS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

October 4, 2018

PER CURIAM.

We have for review Bryan Fredrick Jennings' appeal of the postconviction 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*, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). This Court stayed Jennings' appeal pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017). After this Court decided *Hitchcock*, Jennings responded to this Court's order to

show cause arguing why it 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 ordered full briefing on Jennings' claim that he was denied due process by the substitution of judges, without notice, between the time when the postconviction court denied his rule 3.851 motion and when the court heard his motion for rehearing.

The crimes underlying Jennings' convictions and sentence of death, at issue in this case, have been summarized as follows:

> In the early morning hours of May 11, 1979, Rebecca Kunash was asleep in her bed. A nightlight had been left on in her room and her parents were asleep in another part of the house. The Defendant went to her window and saw Rebecca asleep. He forcibly removed the screen, opened the window, and climbed into her bedroom. He put his hand over her mouth, took her to his car and proceeded to an area near the Girard Street Canal on Merritt Island. He raped Rebecca, severely bruising and lacerating her vaginal area, using such force that he bruised his penis. In the course of events, he lifted Rebecca by her legs, brought her back over his head, and swung her like a sledge hammer onto the ground fracturing her skull and causing extensive damage to her brain. While she was still alive, Defendant took her into the canal and held her head under the water until she drowned. At the time of her death, Rebecca Kunash was six (6) years of age.

Jennings v. State (*Jennings V*), 512 So. 2d 169, 175-76 (Fla. 1987) (quoting sentencing order), *cert. denied*, 484 U.S. 1079 (1988); *see Jennings v. State* (*Jennings I*), 413 So. 2d 24, 25 (Fla. 1982). Jennings was convicted of first-degree murder and sentenced to death following a jury's recommendation for death by a vote of eleven to one. *Jennings V*, 512 So. 2d at 173. His sentence of death

became final in 1988. *Jennings*, 484 U.S. 1079. Thus, *Hurst* does not apply retroactively to Jennings' sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the postconviction court's denial of Jennings' motion.[1]

We further conclude that Jennings is not entitled to relief on his claim that he was denied due process by the substitution of judges on his case between the denial of his motion for postconviction relief and his motion for rehearing. This Court has explained that "[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990); *see Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

Despite the change in judges, Jennings was given a meaningful opportunity to be heard before his motion for rehearing was denied. *See Huff*, 622 So. 2d at 983. Jennings was also given a meaningful opportunity to raise objections on rehearing. In fact, the new judge, Judge Mahl, reviewed the entire case, as Jennings acknowledges, before denying Jennings' motion for rehearing. *See id.*; *see also Glock v. Moore*, 776 So. 2d 243, 249 (Fla. 2001) (The defendant's "ability to raise objections negated any due process concerns."). Likewise, Jennings does

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1. The Court having carefully considered all arguments raised by Jennings, we caution that any rehearing motion containing reargument of *Hurst*-related claims will be stricken.

not allege "any impropriety or appearance of impropriety by" Judge Mahl on rehearing. *Marek v. State*, 14 So. 3d 985, 1002 (Fla. 2009).

CONCLUSION

For the reasons explained above, we affirm the postconviction court's order denying Jennings' successive motion for postconviction relief.

It is so ordered.

LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
CANADY, C.J., concurs in result.
PARIENTE, J., concurs in result with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., concurring in result.

I agree that Jennings' right to due process was not violated by the reassignment of judges, without notice, between the denial of his motion for postconviction relief and his motion for rehearing. I concur in result only as to the *Hurst*[2]-related issue. While I recognize that this Court's opinion in *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017), is now final, as I explained in my dissenting opinion in *Hitchcock*, I would apply *Hurst* retroactively to Jennings' sentence of death. *See Hitchcock*, 226 So. 3d at 220-23 (Pariente, J.,

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2. *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017); *see Hurst v. Florida*, 136 S. Ct. 616 (2016).

dissenting); *see also Asay v. State* (*Asay V*), 210 So. 3d 1, 32-37 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part), *cert. denied*, 138 S. Ct. 41 (2017). Applying *Hurst* to Jennings' case, I would grant a new penalty phase based on the jury's nonunanimous recommendation for death by a vote of eleven to one. Per curiam op. at 2.

An Appeal from the Circuit Court in and for Brevard County,
Jeffrey Mahl, Judge - Case No. 051979CF000773AXXXXX

Martin J. McClain of McClain & McDermott, P.A., Wilton Manors, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Doris Meacham, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

ATTACHMENT B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 3, 2019

Clerk
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Bryan Frederick Jennings
v. Florida
Application No. 18A691
(Your No. SC17-500)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on January 3, 2019, extended the time to and including March 3, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Lisa Nesbitt
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

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