CASE NO. 18-8323

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN FREDERICK JENNINGS

Petitioner,

v.

STATE OF FLORIDA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

ASHLEY MOODY
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar #158541
***Counsel of Record**
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com

Doris Meacham
Assistant Attorney General
Florida Bar # 63265
Office of the Attorney General
444 Seabreeze Blvd. Suite 500
Daytona Beach, Florida 32118
(386)238-4990
doris.meacham@myfloridalegal.com
CapApp@myfloridalegal.com

COUNSEL FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether this Court should deny certiorari to review the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, where the issue of retroactivity was decided as an issue of state law in a decision that does not conflict with any of this Court's precedent and which does not present a significant or unsettled issue of constitutional law worthy of certiorari review?

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at *Jennings v. State*, _ So.3d _, 2018 WL 4784074 (Fla. Oct. 4, 2018)

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on October 4, 2018. Petitioner asserts that this Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Following reversals of his 1980 and 1982 convictions[1], Petitioner, Bryan F. Jennings, in 1986, was tried, convicted, and sentenced to death for first-degree murder, kidnapping with intent to commit sexual battery, sexual battery, and burglary in connection with the 1979 abduction and death of six-year old Rebecca Kunash. In its decision affirming Petitioner's convictions and death sentence, the Florida Supreme Court summarized the facts of the murder and the facts that supported the trial court's aggravation and mitigation findings 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. Jennings 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, Jennings took her into the canal and

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[1] The Florida Supreme Court vacated Petitioner's first conviction and death sentence ("1980 trial") on direct appeal finding Petitioner's confession admitted properly but determining he had been "denied cross-examination of a vital and material witness," and remanding for a new trial. *Jennings v. State*, 413 So. 2d 24, 25–26 (Fla. 1982) ("*Jennings I*"). After the second trial ("1982 trial"), the Florida Supreme Court affirmed the conviction and death sentence, rejecting Petitioner's complaint that his confession was admitted in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Jennings v. State*, 453 So. 2d 1109, 1111 (Fla. 1984) ("*Jennings II*"). This Court disagreed and vacated the conviction. *Jennings v. Florida*, 470 U.S. 1002 (1985) (mem.). Based on that decision, the Florida Supreme Court remanded for a new trial. *Jennings v. State*, 473 So. 2d 204 (Fla. 1985).

> 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, 512 So. 2d 169, 175-76 (Fla. 1987).

In 1989, Jennings' motion for postconviction relief was denied. The Florida Supreme Court affirmed the denial, *Jennings v. State*, 583 So. 2d 316, 319 (Fla. 1991) but found that he had been denied public records in error and permitted him time to file another motion for postconviction relief arising out of the disclosure of additional public records. After receipt of the State Attorney's trial file, Jennings filed a motion for postconviction relief, and an evidentiary hearing was held. Again, postconviction relief was denied, Jennings appealed, and the Florida Supreme Court affirmed. *Jennings v. State*, 782 So. 2d 853 (Fla. 2001).

Having been denied relief in state court, Jennings filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District of Florida. The United States District Court denied federal habeas relief. *Jennings v. Crosby*, 392 F. Supp. 2d 1312 (N. D. Fla. 2005). The United States Eleventh Circuit Court of Appeals affirmed. *Jennings v. McDonough*, 490 F.3d 1230 (11th Cir. 2007).

Jennings thereafter filed his first successive rule 3.851 motion on April 8, 2008. This was denied summarily, and the Florida Supreme Court affirmed the trial court's order denying said motion. *Jennings v. State*, 36 So.3d 84 (Fla. 2010). Subsequently, Jennings filed a second successive postconviction relief motion on November 27, 2010 raising claims based on *Porter v. McCollum*, 130 S. Ct. 447

(2009). On appeal, the Florida Supreme Court affirmed the summary denial of relief and the trial court's order which denied Jennings motion to amend which was addressed to an affidavit signed by trial witness, Clarence Muszynski. *Jennings v. State*, 91 So.3d 132 (Fla. 2012) (unpublished opinion). However, the Florida Supreme Court gave Jennings 30 days to file another successive motion based on that affidavit nunc pro tunc to February 28, 2011. *Id.* at 132.

In response to the Florida Supreme Court's ruling, Jennings filed his third successive 3.851 motion on June 25, 2012 alleging discovery of new evidence. After an evidentiary hearing, the trial court denied said motion by written Order on June 5, 2013, finding that Muszynski's recantation testimony was "inherently incredible". The Florida Supreme Court affirmed on August 28, 2015 and denied rehearing on January 14, 2016. *Jennings v. State*, 192 So.3d 38 (Fla. 2015). The Florida Supreme Court's denial of Jennings successive postconviction motion was based upon the trial court's credibility finding's regarding unsubstantiated recanting witness testimony from Muszynski.

While Jennings' motion for rehearing was pending, this Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016). Within a few months, the Florida Supreme Court rendered *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert denied*, 137 S. Ct. 2161 (2017), after which the state legislature revised Florida's capital sentencing statute pursuant to the high court's directives. *Perry v. State*, 210 So.3d 630 (Fla. 2016),

Fla. Stat. § 921.141 (2017).

On October 20, 2016, Jennings filed his fourth successive motion to vacate his death sentence alleging entitlement to relief pursuant to both *Hurst* decisions as well as the new sentencing statute. 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 based on the Florida Supreme Court's ruling in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017). Jennings filed a response to the show cause order advising that *Hitchcock* did not address the issue he wished to present. The Florida Supreme Court ordered full briefing on his 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. Thereafter, Jennings filed his initial brief which also argued that "fundamental fairness" required retroactive relief in his case. 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. Oct. 4, 2018) Jennings now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Shortly after this Court issued *Hurst v. Florida*, the Florida Supreme Court and the state legislature made significant changes to Florida's sentencing procedures in capital cases. In addition to addressing the shortcomings identified by this Court in *Hurst*, Florida's high court also required that all new death sentences be supported by a unanimous jury's sentencing recommendation. Not surprisingly, many already death-sentenced inmates sought relief and raised every conceivable argument to persuade the court to grant new sentencing trials. The Florida Supreme Court ultimately determined that relief would be given only to those defendants whose cases were final after this Court's decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002) was rendered in 2002. Because Jennings' case was final in 1988, his bid for relief failed as a matter of state law.

Regardless, Jennings contends that the lower court's alleged failure to consider his arguments regarding retroactivity amounts to an arbitrary or capricious application of the law in violation of the Eighth and Fourteenth Amendments. Florida's retroactivity determination was based on an application of Florida Supreme Court precedent, and as will be seen, the state court addressed all of Jennings' claims; accordingly, there is no reason for this Court to consider granting review.

Certiorari is inappropriate here because the Florida Supreme Court's rulings are wholly consistent with the United States Constitution. Jennings fails to identify

any compelling reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Jennings cites no decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Jennings v. State*, _ So.3d _, 2018 WL 4784074 (Fla. Oct. 4, 2018). Nothing presented in Jennings' petition justifies the exercise of this Court's certiorari jurisdiction.

I. The Florida Supreme Court's failure to give full retroactive effect to the *Hurst* decisions does not violate the Eighth or Fourteenth Amendment.

Jennings complains that the Florida Supreme Court arbitrarily ignored his argument that *Hurst v. State* had to be a part of the analysis of whether the newly discovered evidence would probably result in a less severe sentence if a new penalty phase was ordered. (Motion at 11). In his petition to the Florida Supreme Court, Jennings asserted that two Florida decisions, *Swafford v. State*, 125 So.3d 760 (Fla. 2013) and *Hildwin v. State*, 141 So.3d 1178 (2014) require cumulative analysis of all admissible evidence, including the likely effects of Florida' s newly enacted capital sentencing procedures that require penalty phase unanimity. Fla. Stat. § 921. 141 (2017). Jennings, who believes that Florida's high court arbitrarily failed to address his claim, asks this Court to intervene. This is merely another attempt to avoid the Florida Supreme Court's retroactivity ruling under the guise of a newly discovered evidence claim.

Respondent initially notes that this Court has consistently 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. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So.3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So.3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So.3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So.3d 644 (Fla. 2018), *cert. denied*, 138 S. Ct. 2657 (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*, 138 S. Ct. 2653 (2018). Petitioner offers no persuasive, much less compelling reasons, for this Court to grant review of his case.

Under Florida law, postconviction claims must be filed within one year after the defendant' s conviction becomes final unless one of two exceptions apply- the proposed claim relies on newly discovered factual evidence, or a new and fundamental constitutional right that has been held to apply retroactively. *See* Fla. R. Crim. P. 3. 851 (d) (2). The postconviction court found that Jennings' successive postconviction motion, filed long after the one-year deadline, failed to meet either exception, a determination that was affirmed by Florida' s high court. Jennings' claim was based in part on the argument that enactment of a revised capital sentencing statute was a newly discovered fact. In Jennings' view, Florida's

jurisprudence governing newly discovered evidence mandates consideration of statutory revisions in the same manner as any other newly discovered fact under Florida law, which requires a cumulative examination of newly discovered facts along with all admissible evidence in assessing the likelihood of a more favorable outcome on retrial. The Florida Supreme Court rejected this argument:

> Jennings' motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 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*, 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.), *cert. denied*, 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 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.
>
> 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, 108 S. Ct. 1061, 98 L.Ed.2d 1023. 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.

Jennings v. State, _ So.3d _, 2018 WL 4784074 (Fla. Oct. 4, 2018). The Court further cautioned that it had "carefully considered all arguments raised by Jennings, so "any rehearing motion containing reargument of *Hurst*-related claims will be stricken. *Id.*

In *Walton v. State,* 246 So.3d 246 (Fla. 2018) *cert denied*, 2019 WL 659964

(2019) the Florida Supreme Court rejected this same argument. In discussing treating changes in state law as newly discovered "facts," the Florida Supreme Court held:

> This Court applies the *Witt v. State*, 387 So. 2d 922 (Fla. 1980), standard to determine whether decisional changes in the law require retroactive application. *See Coppola v. State*, 938 So. 2d 507, 510-11 (Fla. 2006); *see also State v. Glenn*, 558 So. 2d 4, 6 (Fla. 1990) ("[A] ny determination of whether a change in the law requires retroactive application should be decided upon traditional principles pertaining to changes in decisional law as set forth in *Witt*." (citing *McCuiston v. State*, 534 So. 2d 1144, 1146 (Fla. 1988))). Viewing decisional changes in the law as newly discovered "facts" would erase the need for a retroactivity analysis pursuant to *Witt. See Coppola*, 938 so. 2d at 510-11. Yet Walton contends that he satisfies the second prong of the newly discovered evidence standard because it is probable that a resentencing jury will not unanimously return death recommendations, and thus, it is probable that life sentences will be imposed. Clearly, Walton is attempting to circumvent this Court' s retroactivity holding in *Asay V* when he asserts that *Hurst* constitutes a newly discovered fact and is applicable through a cumulative analysis. Thus, we conclude that Walton' s attempt to shoehorn *Hurst* retroactivity through a newly discovered evidence claim is meritless. Accordingly, we hold that the postconviction court properly denied Walton's motion.

Walton at 251-252. Notably, counsel of record in *Walton* and *Asay* is also counsel for Jennings before this Court.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt v. State,* 387 So. 2d 922 (Fla. 1980), is based on an independent state ground and is not violative of federal law or this Court's precedent. Indeed, Jennings' case was final when this Court decided that *Ring* is not retroactive. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct

review").[2] The Florida Supreme Court's ruling on retroactivity does not conflict with any precedent of this Court or present an important or unsettled question of federal law.

Aside from the settled question of retroactivity, review of this case would be inappropriate because there is no underlying Sixth Amendment error. *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. The unanimous verdict by Jennings' jury establishing his guilt of qualifying contemporaneous felonies, was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point.[3] *Jennings*, 512 So. 2d at 176 ("The murder was committed by appellant while he was engaged in the commission of, or flight after committing, the crimes of burglary, kidnapping and rape."). The findings required by the Florida Supreme Court following remand in *Hurst v. State* involving the weighing and selection of a defendant's sentence are not required by the Sixth

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[2] As explained by the Eighth Circuit in *Walker v. United States*, 810 F.3d 568, 575 (8th Cir. 2016), the consensus of judicial opinion flies squarely in the face of giving any retroactive effect to an *Apprendi* based error. *Apprendi's* rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing factors" does not lay "anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial."

[3] § 921.141(5)(b)(previously convicted of another capital felony or of a felony involving the use or threat of violence to the personas an aggravator).

Amendment.[4] *See e.g.*, *McGirth v. Sate*, 209 So.3d 1146, 1164 (Fla. 2017). Since there is no underlying constitutional error under the facts of this case, certiorari should be denied. *See Jenkins v. 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); *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)).

Lastly, Jennings postulates that the Florida Supreme Court has failed to recognize the creation of a new substantive rule in *Hurst v. State* which must be applied retroactively to all cases in which alleged *Hurst* error occurred. Jennings

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[4] Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. *See State v. Mason*, 153 Ohio St. 3d 476, 483, 108 N.E.3d 56, 64, *cert. denied,* 139 S. Ct. 456 (2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted); *Underwood v. Royal*, 894 F.3d 1154, 1186 (10th Cir. 2018) (holding that the Court's decision in *Hurst v. Florida* was limited to aggravating circumstances and did not extend to mitigating circumstances or weighing); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."). See also *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.")

posits that *Hurst* identified the statutory elements that had to have been proven beyond a reasonable doubt, which causes a substantive change, making *Hurst* retroactive under federal law. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, *see* § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. *Victorino v. State*, 241 So.3d 48 (Fla. 2018). These additional requirements imposed by *Hurst v. State* are not "elements" of a capital offense, contrary to Jennings' argument. Every one of these claims has been addressed and rejected by the Florida Supreme Court. *See Asay v. State*, 224 So.3d 695 (Fla. 2016), *cert. denied*, 138 S. Ct. 513 (2017); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017). Jennings's arguments do not identify any federal or state court conflict, and instead amount to his general disagreement with how Florida has elected to apply its own death penalty laws. This amounts to yet another endeavor to urge universal retroactivity of the *Hurst* decisions.

This is no Federal constitutional violation; certiorari review by this Court would involve nothing more than an examination of Florida' s application of its own state law. In sum, the questions Jennings presents do not offer any matter which comes within the parameters of this Court' s Rule 10. He does not identify any direct conflict with this Court or other courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well—established principles to the Florida Supreme Court's decision. As Jennings does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction, this Court should deny the petition.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL
Tallahassee, Florida

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar #158541
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com

Doris Meacham
Assistant Attorney General
Florida Bar # 63265
Office of the Attorney General
444 Seabreeze Blvd. Suite 500
Daytona Beach, Florida 32118
(386)238-4990
doris.meacham@myfloridalegal.com
CapApp@myfloridalegal.com

COUNSEL FOR RESPONDENT