

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

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IN THE

SUPREME COURT OF THE UNITED STATES

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WAYNE BISSO,

*Petitioner,*

VS.

STATE OF FLORIDA,

*Respondent.*

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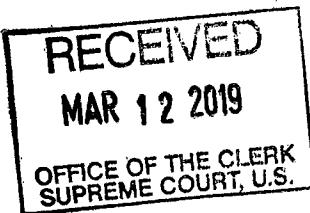
ON PETITION FOR A WRIT OF CERTIORARI TO  
DISTRICT COURT OF APPEAL, FOURTH DISTRICT, FLORIDA

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**PETITION FOR WRIT OF CERTIORARI**

PROVIDED TO  
SOUTH BAY CORRECTIONAL FACILITY  
ON 2/27/19 WB FOR MAILING

Wayne Bisso #K72335  
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## **QUESTIONS PRESENTED**

### **SYNOPSIS**

In 1990, Petitioner Wayne Bisso and Gina Marie Gambidilla entered into a common-law marriage in the State of Georgia and lived together until 1995. They held themselves out to be husband and wife the entire time.

The happy couple moved to Florida. They lived resided there until Gina's unfortunate passing. Upon her death, as surviving spouse, Mr. Bisso was entitled to all of her personal belongings.

After her death, the mother of Gina moved to have her daughter's belongings returned to her. Mr. Bisso claimed that since he was the common-law spouse, Gina's estate was automatically passed down to him.

Mr. Bisso was later arrested for grand theft along with other charges related to Gina's possessions. Mr. Bisso contends that the Fourteenth Amendment Due Process Clause protects him from being convicted of stealing property that rightfully belongs to him. This leads to this compelling question.

### **QUESTION ONE**

**Whether the Due Process Clause of the Fourteenth Amendment protects a surviving spouse, who is factually and actually innocent, from being convicted and imprisoned for stealing their own property, where, upon the death of the common-law spouse, the Estate is passed down to the surviving spouse?**

### **QUESTION TWO**

**Whether *Blockburger*<sup>1</sup> protects a surviving spouse under the Double Jeopardy Clause of the Fifth Amendment from being convicted of both First Degree Grand Theft and Grand Theft of a Motor Vehicle when all the same property was grouped in one “theft”?**

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<sup>1</sup> *Blockburger v United States*, 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932)

## **INTERESTED PARTIES**

There are no interested parties to the proceeding other than those named in the caption of the case.

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<sup>2</sup> *Blockburger v United States*, 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932)

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IN THE SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix \_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

[ ✓ ] For cases from state court:

The opinion of the of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or

[ ] has been designated for publication but is not yet reported; or

[ ✓ ] is unpublished.

## **JURISDICTION**

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeal on the following date: \_\_\_\_\_ and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_.

[ ✓ ] For cases from state court:

[ ✓ ] The date on which the highest state court decided my case decided my case was November 29, 2018. A copy of that decision appears at Appendix A.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was thereafter denied on the following date \_\_\_\_\_ and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED**

The Fourteenth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.

O.C.G.A. § 19-3-1.1, Georgia Code, Prerequisites to valid marriage.

To constitute a valid marriage in this state there must be:

- (1) Parties able to contract;
- (2) An actual contract; and
- (3) Consummation according to law.

### **Florida Statute § 741.211. Common-law marriages void.**

No common-law marriage entered into after January 1, 1968, shall be valid, except that nothing contained in this section shall affect any marriage which, though otherwise defective, was entered into by the party asserting such marriage in good faith and in substantial compliance with this chapter.

### **Florida Statute § 812.014. Theft.**

**(1)** A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

- (a)** Deprive the other person of a right to the property or a benefit from the property.
- (b)** Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

**(2) (a) 1.** If the property stolen is valued at \$100,000 or more or is a semitrailer that was deployed by a law enforcement officer; or

**2.** If the property stolen is cargo valued at \$50,000 or more that has entered the stream of interstate or intrastate commerce from the shippers loading platform to the consignees receiving dock; or

**3.** If the offender commits any grand theft and:

**a.** In the course of committing the offense the offender uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense and thereby damages the real property of another; or

**b.** In the course of committing the offense the offender causes damage to the real or personal property of another in excess of \$1,000,

the offender commits grand theft in the first degree, punishable as a felony of the first degree, as provided in s. 775.082, s. 775.083, or s. 775.084.

## STATEMENT OF THE CASE AND FACTS

Mr. Bisso and Gina Gambidilla have claimed (with support) all along that they were common law husband and wife; that they maintained this relationship throughout the entire time they were together as a couple for almost 15 years, a common law married couple and always expressed as much to family, friends and business associates.

Mr. Bisso, throughout the State proceedings, explained that common-law marriage **was** a recognizable defense to the charges that he faced. Here, the common-law marriage took place in Georgia, and that Florida, at the time of the alleged "offenses" for which Mr. Bisso was charged, was an established defense that was recognized in the State of Florida.

Evidence was established that the couple cohabited together from 1990 in Georgia until 2003 in Florida at the untimely passing of Gina.

The couple co-owned property together, ran a business together, lived as a married couple in Georgia and in Florida, rented to own a home through Remax Realty, via the option to purchase. The couple eventually obtained a mortgage on that home, the same home Mr. Bisso is alleged to have "stolen".

On May 11, 2007, a jury found Appellant guilty of first degree grand theft (Count 4), grand theft of a motor vehicle (Count 5), uttering a forged instrument (Count 6), and perjury (Count 7). On October 25, 2007, the trial court sentenced Appellant, on Count 4, to five years imprisonment followed by twenty years

probation, on Count 5, to two years imprisonment, and as to Counts 6 and 7, five years imprisonment.

Petitioner appealed his judgment of convictions and sentences to this Honorable Court. And on October 15, 2008, this Court *per curiam* affirmed his convictions and sentences without a written opinion; mandate issued on November 14, 2008. *See Bisso v. State*, 993 So. 2d 534 (Fla. 4 DCA 2008).

On August 7, 2017, Appellant filed a petition for writ of habeas corpus in the St. Lucie County Circuit Court challenging his convictions and sentences. In an order dated January 2, 2018, the Court construed the petition as a rule 3.850 motion for post-conviction relief and summarily denied it on the basis that it was untimely and successive. (See Appendix B)

The Fourth District Court of Appeal granted a petition for belated appeal and afforded Appellant an opportunity to appeal the trial court's denial of his habeas petition. The Fourth District Court of Appeal issued a *per curiam affirmed* opinion on November 29, 2018. (See Appendix A)

This certiorari petition follows.

## REASONS FOR GRANTING THE PETITION

This case presents an issue that will make a significant impact how common-law marriages are viewed in this ever-evolving society. This Court will explain to the courts across the country how to interpret common-law marriage, when inextricably intertwined with criminal law.

### A

#### QUESTION ONE

**Whether the Due Process Clause of the Fourteenth Amendment protects a surviving spouse, who is factually and actually innocent, from being convicted and imprisoned for stealing their own property, where, upon the death of the common-law spouse, the Estate is passed down to the surviving spouse?**

The Due Process Clause of the United States Constitution “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 364, 90 S. Ct. 1068 (1970). The *Winship* reasonable doubt standard applies in both state and federal proceedings. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). The standard protects three interests. First, it protects the defendant’s liberty interest. *See Winship*, 397 U.S. at 363. Second, it protects the defendant from the stigma of conviction. *Id.* Third, it engenders community confidence in the criminal law by giving “concrete substance” to the presumption of innocence. *Id.* at 363-64. In his concurring opinion, Justice Harlan noted that the standard is “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.” *Id.* at 372.

A criminally accused person “is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden.” *Davis v. State*, 90 So. 2d 629, 631 (Fla. 1956); *See Ballard v. State*, 923 So. 2d 475, 482 (Fla. 2006) (“[T]his Court has recognized that it has a fundamental obligation to ascertain whether the State has presented sufficient evidence to support a conviction.”)

*Whether Mr. Bisso’s Fourteenth Amendment rights were violated when Florida failed to recognize his Georgia common-law marriage leading to his arrest, conviction and prison sentence?*

The main thrust of Mr. Bisso’s argument is that, because he was legally married to Gina Marie Gambidilla at the time of her death, her estate legally passed to him upon her death, even in the absence of a will, because he, the surviving spouse, was the sole heir [R. 27-30]. And, given that her estate passed to him upon her death, her estate belonged to him and thus he could not be found guilty of stealing his own property [R. 31].

Moreover, Mr. Bisso explained in his petition that although the State argued at trial that he was not legally married to Gina under Florida law, the State’s argument in this regard carried no weight as he and Gina were married under Georgia’s common-law marriage principles, and Florida respects common-law marriages that were entered into in other states [R. 31-32]. For this proposition, Mr. Bisso relied largely on the First District’s holding in *Anderson v. Anderson*, 577 So. 2d 658, 660 (Fla. 1st DCA 1991) (explaining that Although Florida does not recognize common law marriages entered into after 1968, “Florida will respect a

common law marriage when entered into in a state which recognizes common law marriages.”). Mr. Bisso explained that Georgia—where he and Gina cohabitated and held themselves out to be husband and wife from 1990 to 1995—recognizes common law marriages [R. 28]. Thus, regardless of whether he and Gina were ceremonially married in Florida, they had a valid, binding common-law marriage entered into in the State of Georgia, and Florida was required to honor that marriage [R. 28-29].

### **Trial Court’s Summary Denial**

In summarily denying Mr. Bisso’s petition, the trial court concluded that the proper vehicle to raise the claim Mr. Bisso was a rule 3.850 motion for post-conviction relief [R. 47]. The Court explained that, “Just because the Defendant previously had a rule 3.850 motion denied on its merits and the time to file a motion under that rule has expired, it does not give the Defendant the right to have a second bite at the apple in a habeas corpus petition” [R. 47].

Ultimately, the court concluded that Mr. Bisso’s challenge to his conviction was untimely given that the time for filing a rule 3.850 motion expired in November of 2010 [R. 47-48]. The court also concluded that Mr. Bisso’s habeas petition was successive given that Mr. Bisso has filed multiple post-conviction motions, including, according to the court, a “prior successive rule 3.850 motion that raised the same issues as raised in this petition” [R. 48]. The court concluded that Mr. Bisso’s petition was “procedurally barred” [R. 48] and did not adjudicate the merits of Mr. Bisso’s manifest injustice claim.

## B

### Analysis

Mr. Bisso maintains that regardless of how many previous motions he has filed, his current confinement constitutes a manifest injustice, as he is both factually and actually innocent of crimes for which he currently stands convicted. Florida honors common-law marriages entered into in other states. *See Anderson*, 577 So. 2d at 660. And because Mr. Bisso was legally married to Gina Marie Gambidilla based on a common-law marriage entered into in the State of Georgia, Gina's estate passed to him, the surviving spouse and sole heir, upon her death; and thus he could not be charged with, much less found guilty, of stealing his own property. Indeed, Mr. Bisso should never have been charged with or convicted of any theft charges given that the property at issue legally belonged to him.

Although Florida does not recognize the validity of common-law marriages contracted in Florida after 1968, *Anderson*, 577 So. 2d at 660 (citing § 741.211, Fla. Stat. (1969)), Florida does, however, recognize common-law marriages that are entered into in states that do accept common-law marriages. *Id.* (citing *Johnson v. Lincoln Square Props., Inc.*, 571 So. 2d 541 (Fla. 2 DCA 1990)). Ultimately, “[t]he validity of a marriage is to be determined by the law of the jurisdiction where the marriage was entered into.” *Id.*

Here, Mr. Bisso and Gina entered into a common-law marriage in the State of Georgia. Mr. Bisso and Gina's common-law marriage in Georgia was initiated in 1990, and they lived in Georgia until 1995 where they cohabitated and held

themselves out to be husband and wife the entire time. And, during that particular time period, common-law marriages were honored in the State of Georgia. *See* O.C.G.A. § 19-3-1.1, Georgia Code.

A common law marriage is “[a] marriage that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple.” BLACK’S LAW DICTIONARY 986 (7th ed. 1999). When recognized in Florida, common law marriages were given the “same dignity and recognition” as was accorded to ceremonial marriages. *Budd v. J.Y. Gooch Co.*, 157 Fla. 716, 27 So. 2d 72, 74 (1946). Elements of common law marriage in Florida include cohabitation and the essential element of a mutual agreement between the parties “to be husband and wife.” *Phillips v. Phillips*, 215 So. 2d 83, 84 (Fla. 3 DCA 1968) (citation omitted).

In this case, it is undisputed that Mr. Bisso and Gina cohabitated and that there was a mutual agreement between them that they were husband and wife. In support of his claim in the lower court, Mr. Bisso attached to his petition numerous sworn affidavits from various people attesting to the obvious existence of his and Gina’s common-law marriage. In the affidavits, the affiants all consistently and unequivocally state that Mr. Bisso and Gina, for all intents and purposes, held themselves out to be husband and wife, and that everyone who knew them believed them to be husband and wife. They lived together. They introduced themselves as husband and wife when they met new people. And even for those who did not know

them personally, anyone who observed them would have believed they were indeed husband and wife.

Accordingly, Mr. Bisso's common-law marriage with Gina was binding and should have been honored in this state. *See Johnson*, 571 So. 2d at 542 (holding that Florida Statute Section 741.211 did not serve to render validly entered, out-of-state common law marriages invalid). And because Mr. Bisso was the surviving spouse, *i.e.*, Gina's sole heir, her estate would have passed to him upon her death. As such, Mr. Bisso should never have been charged with, much less convicted of, stealing property that legally belonged to him—property that legally passed to him upon Gina's passing.

Section 731.201(18) defines "heirs" as "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent." A reference to "heirs" is generally considered as referring to those who inherit under the laws of intestate succession. *See, e.g., Arnold v. Wells*, 100 Fla. 1470, 131 So. 400 (1930). Thus, it is beyond dispute that, since Gina died *intestate*, her estate would have automatically passed to Appellant, the surviving spouse (or heir), upon her death.

C

#### MR. BISSO'S RIGHT TO THE PROPERTY

Pursuant to *United States v. Elashi* 789 F.3d 547 (5<sup>th</sup>. Cir. 2015) (All property that the spouses possess during their marriage is presumed to be

community property, and each spouse has an undivided, one-half interest in all community assets).

Accordingly, Mr. Bisso was entitled to half of the property that he and Gina obtained while Gina was still alive, and when her untimely and unfortunate passing occurred, Mr. Bisso became the sole owner of any property that the common law couple obtained during their relationship as husband and wife. As such, he was entitled to do with the property as he wished, up to and including, selling it if he chose to do so. Mr. Bisso should not have been charged, tried, and convicted for selling his own rightful property contrary to anyone's belief otherwise, namely, Gina's mother who instigated the process in the first place.

There was no valid "contract" allotting any property or belongings from the common law couple to Gina's mother upon her passing, only the Mother's intent to achieve financial gain over Mr. Bisso on the untimely demise of his common law wife, Gina.

## I

Under Georgia law at the time, and also recognized by the State of Florida at that time, Georgia Law, O.C.G.A. 19-3-1 applies equally to both ceremonial law and common-law marriages. See, *Metropolitan Life Ins. Co. v. Lucas* 761 F. Supp. 130 (M.D. Ga. (1991)).

In *Kersey v. Gardner* 264 Ga. App. 316, 618 S.E. 2d 97 (2005) it was determined that in order for a common-law marriage to come into existence the parties must be able to contract (of which Mr. Bisso and Ms. Gambidilla were able

to do), must agree to live together as man and wife (of which the couple did in Georgia and in Florida throughout their entire relationship with mutually owned property and material items) and must consummate the agreement (again of which the couple properly did so) and all three of these elements must be met simultaneously under O.C.G.A 19-3-1.

Various friends, neighbors, associates, and people in the Art community, of which the couple was prevalent, knew the couple and were as husband and wife, as the couple introduced each other as husband and wife. See, *Cobb v. Heckler* U.S. District Lexis 15767 (1984) (In the case of a common law marriage, "This may be done by . . . such circumstances as the act of living together as man and wife, holding themselves out to the world as such, and repute in the vicinity and among neighbors and visitors that they are such, and indeed such facts as usually accompany the marriage relation and indicate the factum of marriage.

Evidence was established that the couple cohabited together from 1990 in Georgia until 2003 in Florida at the untimely passing of Gina.

The couple co-owned property together, ran a business together, lived as a married couple in Georgia and in Florida, rented to own a home through Remax Realty, via the option to purchase. The couple eventually obtained a mortgage on that home, the same home Mr. Bisso is alleged to have "stolen".

The *Carter* court explained it best in *Carter v. Carter* 309 So.2d 625 (Fla. 3<sup>rd</sup> DCA 1975):

"A common-law marriage or marriage *per verba de praesenti*, is distinguished from a ceremonial marriage,

may be proven in various ways. The best evidence of such marriage would, of course be testimony of the contracting parties or those present when they mutually agreed to take each other as man and wife, but it may be established by what is termed a habit or repute. In other words, proof of general repute had cohabitation as man and wife will support a presumption of marriage when the agreement is denied and cannot be proven by best evidence."

Although this issue was not presented as an ineffective assistance of counsel claim, Counsel is required to know the applicable law at the time to adequately defend his client of the charges against him. Had the jury heard and understood the law at the time, (of which they were not properly instructed, or in fact, instructed at all) there is a reasonable probability that the outcome of the proceedings would have been different, *i.e.* an acquittal, as the common law marriage between the two was a legal binding agreement at the time of the unfortunate demise of Gina.

At trial, the witnesses' testimony corroborated the existence of this common-law marriage. Therefore, Mr. Bisso had the right to sell or do anything he wished with the property.

Additionally, the State Court never held a hearing to determine the "marital status" of Gina and Mr. Bisso before the criminal prosecution began so that the Court could have properly instructed the jurors as to the applicable law.

The errors presented in this case have gone beyond the basic tenets of "fundamental" error are of such a nature that the conviction and sentence is a grave miscarriage of justice that destroys the foundation of the conviction and also one that requires reversal.

## II

It was well established that Mr. Bisso's and Gina's common law marriage was a recognized marriage for purposes of Mr. Bisso's entitlement to the property and belongings they accrued during their relationship and was relevant to the material issue of "ownership." Therefore, as rightful and legal owner of the belongings of the marital couple, Mr. Bisso was entitled to do as he wished with the property. He should not have been arrested or convicted of "stealing and/or selling" his own property.

Additionally, it was Gina's intent for Mr. Bisso to have sole possessory rights to said property upon her demise. This should have been brought to the attention of the jury for their consideration prior to convicting Mr. Bisso.

The State relied on a theory that Mr. Bisso deprived the "true" owner of the property to the value of over \$100,000 either permanently or temporarily; that he was not entitled to the property. The claim made by the State was that Gina was the "owner and custodian" of the property even though it was mutually acquired and shared property from their common law marriage. This established the fact that Gina wanted Mr. Bisso, her husband, to have all of their combined property upon her death. Gina had explained her intentions to friends and family for her possessions to be passed on to her common-law husband Wayne Bisso.

As such, Mr. Bisso cannot legally be charged with stealing his own property that was accumulated between himself and his wife Gina. After the claim of marriage has been made, the weight of evidence falls upon the State to disprove it.

## **Question Two**

**Whether *Blockburger* protects a surviving spouse under the Double Jeopardy Clause of the Fifth Amendment from being convicted of both First Degree Grand Theft and Grand Theft of a Motor Vehicle when all the same property was grouped in one “theft”?**

The State further “double charged” Mr. Bisso with First degree grand theft and Grand theft of a motor vehicle, all under the guise of the same “theft”. Under the *Blockburger*<sup>3</sup> test, this is a double jeopardy violation that must also be addressed and reversed.

These two charges constitute one offense for the purposes of a double jeopardy review as the alleged “theft” was of one piece of property, a car that, as a matter of law, was a continuous “offense” dating from August 19, 2003 through August 17, 2005. The law is well established that a defendant is placed in double jeopardy where based upon the same conduct, the defendant is convicted of two offenses, each of which does not require proof of a different element. The “theft” of both counts does not contain any additional element that the other does not.

Accordingly, the offense of Grand theft and theft of the motor vehicle constituted the same “theft” and violates the principles of double jeopardy, requiring vacating one of the counts.

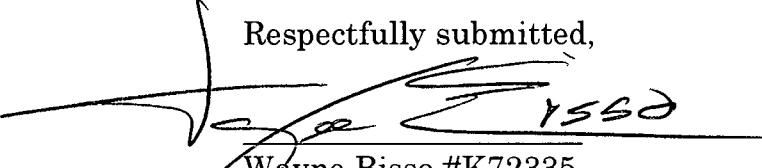
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<sup>3</sup> *Blockburger v United States*, 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

## CONCLUSION

This Court should grant this petition for writ of certiorari. The first constitutional question presented will require this Court to clarify the definition of common-law marriage in evolving standards of society. The second question will require the Court to conduct a *Blockburger* analysis as it relates to the convictions of grand theft and grand theft of a motor vehicle.

Respectfully submitted,

  
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