**IN THE SUPREME COURT OF FLORIDA**
**CASE NOS. SC13-2248 & SC02-2143**

**BRYAN FREDERICK JENNINGS,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

**_____**

**BRYAN FREDERICK JENNINGS,**

**Petitioner,**

**v.**

**JULIE L. JONES,**

**Respondent.**
**_____/**

**MOTION TO REOPEN APPEAL AND/OR RECALL OR STAY THE MANDATE, MOTION TO REPOPEN HABEAS PROCEEDING, AND MOTION FOR ORDER DIRECTING SUPPLEMENTAL BRIEFING IN LIGHT OF *HURST V. FLORIDA***

**COMES NOW** the Appellant, **BRYAN FREDRICK JENNINGS**, by and through undersigned counsel, and herein moves the Court to reopen his appeal and/or recall or stay the mandate in Case No. SC13-2248, which arose from the denial of Mr. Jennings' recent Rule 3.851 motion, reopen the habeas proceeding in Case No. SC02-2143 initiated in 2002, and order the parties to provide supplemental briefing and argument as to the effect of the recent decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), on Mr. Jennings' death sentence. In support thereof, Mr. Jennings states as follows:

1. Mr. Jennings is a Florida death-sentenced inmate. He was tried, convicted and sentenced to death in 1986. This Court affirmed the sentence on direct appeal. *Jennings v. State*, 512 So. 2d 169 (Fla. 1987).[1] When considering an appeal from Mr. Jennings' first collateral challenge to his death sentence, this Court rejected an *ex post facto* challenge to one of the three aggravating circumstances in his case. *Jennings v. State*, 583 So. 2d 316, 321 (Fla. 1991) ("Jennings also claims that the cold, calculated, and premeditated factor was unconstitutionally applied retroactively during sentencing. We have previously rejected this claim on its merits."). The cold, calculated and premeditated aggravator had been adopted after the crime for which Mr. Jennings was convicted had occurred. In the case of *Zeigler v. State*, 580 So. 2d 127, 130 (Fla. 1991), which this Court relied upon in rejecting Mr. Jennings' *ex post facto* challenge to the CCP aggravator, this Court wrote: "We determined that the factor could be constitutionally applied to a crime committed before the factor was enacted because the statute only reiterated an element already present in the crime of premeditated murder. *Id.* at 421. Premeditation was not an entirely new factor. Therefore, the use of the factor in this

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[1] This Court had vacated the convictions and death sentences returned at Mr. Jennings' first two trials. *See Jennings v. State*, 413 So. 2d 24 (Fla. 1982); *Jennings v. State*, 473 So. 2d 204 (Fla. 1985).

case does not violate the ex post facto laws." This Court's reasoning in rejecting the *ex post facto* challenge to the CCP aggravator in Mr. Jennings' case seems unsustainable in light of *Hurst v. Florida*, 136 S.Ct. 616 (2016).

2. After the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), Mr. Jennings promptly filed a habeas petition with this Court on October 2, 2002, in which based on *Ring* he argued: "FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. JENNINGS OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHTS TO DUE PROCESS." Habeas Petition at 16, *Jennings v. Moore*, Case No. SC02-2143. In the petition, he relied upon a specific quote from *Ring*: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." Habeas Petition at 17, quoting *Ring v. Arizona*, 536 U.S. at 602. Mr. Jennings then observed that before a death sentence was authorized, Florida law required the trial judge to find: 1) that "sufficient aggravating circumstances exist" to justify the imposition of a death sentence, and 2) that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Accordingly, Mr. Jennings argued that he was deprived of his Sixth Amendment rights under *Ring*. Habeas Petition at 18. On June 18, 2003, this Court issued an order stating simply: "The

petition for writ of habeas corpus is hereby denied." On July 3, 2003, Mr. Jennings filed a motion for rehearing in which he relied heavily upon the decision by the Missouri Supreme Court in *State v. Whitfield*, 107 S.W. 3d 253 (Mo. 2003). On September 8, 2003, this Court denied Mr. Jennings' motion for rehearing without comment.

3. In the appeal in Case No. SC13-2248, this Court recently affirmed the denial of a successive Rule 3.851 motion on which an evidentiary hearing had been conducted by the circuit court. *See Jennings v. State*, 2015 WL 5093598 (Fla. Aug. 28, 2015). This Court denied Mr. Jennings' motion for rehearing on January 14, 2016; however, this Court's docket does not show that a mandate has issued.

4. Two days earlier on January 12, 2016, the United States Supreme Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst,* the Supreme held that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Hurst,* 136 S.Ct. at 619. The Supreme Court explained that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* In *Hurst*, the Supreme Court identified what those critical statutorily defined facts are under Florida law:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death**." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances**." § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State **cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires**.

*Id*. at 622 (emphasis added) (citations omitted).

5. When Mr. Jennings was convicted of first degree murder and sentenced to death, his jury was repeatedly informed that its verdict was merely advisory and that sentencing responsibility rested with the judge. It was further told that its penalty phase verdict was to be returned by a majority vote. The advisory death recommendation showed that the jury's verdict was returned by a vote of 11-1. In his direct appeal, Mr. Jennings argued that he was deprived of his Sixth Amendment right to a jury trial because "[t]he Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury" (Initial Brief at 99). This Court denied this argument "without comment." *Jennings v. State*, 512 So. 2d at 176.

6. Under Florida's statute, authorization for a death sentence is dependent upon the presence of the statutorily-defined facts *in addition to* the verdict unanimously finding the

defendant guilty of first-degree murder. In unmistakably clear language, *Hurst* explained that the requisite additional statutorily-defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); *Hurst*, 136 S.Ct. at 622.

7. The Supreme Court in *Hurst* identified these findings as the operable findings that must be made by a jury. *Hurst*'s holding is rested on the principle that findings of fact statutorily required to authorize a death sentence under Florida law are elements of the offense and separate first-degree murder from capital murder under Florida law. The statutorily defined fact serve as elements of the crime of capital murder in Florida. *See Apprendi*, 530 U.S. at 476; *Jones v. United States*, 526 U.S. 227 (1999). In *Ring*, the Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found it violated the Sixth Amendment. The Supreme Court in *Hurst* found that this Court's consideration in *Bottoson* of the potential impact of *Ring* on Florida's capital sentencing scheme had wrongly failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional.

8. Much of the basis for this Court's erroneous conclusion in *Bottoson* that *Ring* and *Apprendi* were inapplicable in Florida

was this Court's continued reliance on *Hildwin,* which held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." This Court's reliance in *Bottoson* upon the continued vitality of *Hildwin* (and related findings in *Spaziano*) was misplaced and contrary to the logic *Apprendi* and *Ring* as the Supreme Court explained in *Hurst*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641. **Their conclusion was wrong, and irreconcilable with *Apprendi*.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre *Apprendi* decision—*Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648.

*Hurst*, 136 S.Ct. at 622-23 (emphasis added).

9. This Court also failed to recognize that in Arizona, the factual determination required by Arizona law before a death sentence was authorized was the presence of at least *one* aggravating factor. *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination *by the court* that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating**

**circumstances to outweigh the aggravating circumstances.**" § 921.141(3) (emphasis added).

10. In light of *Hurst*, this Court issued orders requesting supplemental briefing in a large number of pending cases. This Court has even recalled the mandate in one case in order to permit briefing of the impact of *Hurst* on a death sentence. *See Hojan v. State*, Case No. SC13-5.

11. Relying on this Court's action in *Hojan v. State*, Mr. Jennings seeks the same opportunity to provide supplemental briefing to this Court as to *Hurst*'s applicability to his case. In order to permit Mr. Jennings to brief the impact of *Hurst* on his sentence of death and this Court's denial of his various collateral challenges to his death sentence, this Court should reopen the appeal and/or recall or stay its mandate in Case No. SC13-2248, or alternatively reopen the habeas proceedings in Case No. SC02-2143.

12. This Court certainly has the ability to recall or stay its mandates during the term in which they were issued. *See State Farm Mut. Auto Ins. Co. v. Judges of Dist. Court of Appeal, Fifth Dist.*, 405 So.2d 980, 982-83 (Fla. 1981) ("An appellate court's power to recall its mandate is limited to the term during which it was issued") (citing *Chapman v. St. Stephens Protestant Episcopal Church, Inc.*, 105 Fla. 683, 138 So. 630 (1932), and

*Washington v. State*, 92 Fla. 740, 110 So. 259 (1926)). *Accord Bottoson v. Singletary*, 685 So.2d 1302, 1304 (Fla. 1997).

13. This Court must also have the power and jurisdiction to reopen a habeas proceeding in order to revisit an erroneously rejected constitutional claim when the United States Supreme Court specifically reverses in another case this Court's identical ruling rejecting the same constitutional claim. This Court's ruling against Mr. Jennings' *Ring* claim was virtually identical to this Court's rejection of Mr. Hurst's *Ring* claim. Given the ruling in *Hurst v. Florida*, this Court should reopen proceedings on Mr. Jennings' 2002 habeas petition.

**WHEREFORE**, based on the foregoing, the Appellant/Petitioner, Bryan Fredrick Jennings, respectfully moves the Court to reopen and/or recall or stay the mandate in Case No. SC13-2248, and/or reopen the habeas proceeding in Case No. SC02-2143, and order the parties to provide supplemental briefing and argument as to the effect of the recent decision in *Hurst v. Florida* on Mr. Jennings' death sentence and this Court's denial of his prior collateral challenges, including this Court's denial of Mr. Jennings' 2002 challenge to his death sentence on the basis of *Ring v. Arizona*.

**I HEREBY CERTIFY** that a true and correct copy of the foregoing motion has been furnished by electronic service to Leslie Campbell, Assistant Attorney General, Office of the

Attorney General, at capapp@myfloridalegal.com her primary email address, and to Billy H. Nolas, Chief, Capital Habeas Unit at his primary email address, billy_nolas@fd.org on this 7th day of March, 2016.

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