IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: SC2025-1686
Lower Tribunal No. 1979-CF-773

BRYAN F. JENNINGS,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

EXECUTION SCHEDULED FOR November 13, 2025, at 6:00P.M.

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PRELIMINARY STATEMENT

The State has filed its answer to Mr. Jennings' initial brief, and this reply follows. The reply will address only the most salient points argued by the State. Mr. Jennings relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

ARGUMENT IN REPLY

ISSUE I: Mr. Jennings' Clemency Proceedings Were Not Constitutional nor Were They Adequate to Support the Signing of the Warrant.

The State argues that the circuit court correctly found that this claim was time-barred and meritless, but their arguments largely misapprehend those made by Mr. Jennings.

As to the timeliness argument, the State suggests that this claim was raised 36 years too late and contra to the requirements of Florida Rule of Criminal Procedure 3.851 ("3.851"). Firstly, the State claims that Mr. Jennings made no effort to show how the claim satisfied rule 3.851(d)(1)-(2). Mr. Jennings detailed how this claim fits squarely within the parameters of 3.851(d)(2) and (e)(2) expounding on the impossibility of predicting a 1989 clemency denial would be relied on in 2025 and that, as the intended final step in

postconviction proceedings, no due diligence could have ascertained that a clemency claim be raised sooner. Init. Br. at 27-28. Even the letter penned on October 10, 2025, notifying Mr. Jennings of his denial, recognized the death warrant "concludes the clemency process." Init. Br. App. Ex. 1.[1] Thus, any clemency claim became ripe precisely when the death warrant was signed.[2]

The Respondent also faults Mr. Jennings for listing mitigation that was known at the time of his first clemency application. Mr. Jennings' newly appointed counsel had the herculean task to review 76,000 pages of case information, meet Mr. Jennings, establish rapport with Mr. Jennings, consult with the Capital Habeas Unit

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[1] The State asks this Court to strike the Appendix because the documents were not submitted to the circuit court. Curiously, Mr. Jennings did not receive this letter until October 28, 2025, after all litigation in the circuit court concluded before receipt of this letter. As such, it was impossible for Mr. Jennings to provide the letter any time before attaching it to the Initial Brief.

[2] The facts here are distinguishable from those in *Ferguson v. State*, 101 So.3d 362, 365-66 (Fla. 2012). Ferguson's arguments stemmed from an "incomplete proceeding in which he was incapable of participating." *Id.* Given these facts, Ferguson could have ascertained with due diligence a clemency claim sooner. Unlike *Ferguson,* the central concern here is that his clemency application was stale. No due diligence could have fathomed that the 1989 clemency denial would be relied upon in 2025. Thus, *Ferguson* is distinguishable and the claim here was timely under the circumstances.

("CHU"), and draft the various motions indicated in both this Court and the circuit court's briefing schedules. Mr. Jennings' counsel merely listed other mitigating circumstances ascertained from within the information provided, as the truncated warrant schedule did not permit further investigation. Rather, Mr. Jennings' newly appointed counsel detailed all the areas that clemency could, and would, have been uncovered with additional time. Init. Br. at 22-23.

The Respondent further faults Mr. Jennings for not reapplying for clemency on his own accord. Mr. Jennings' clemency counsel passed away decades ago.[3] Despite the Florida Commission on Offender Review appointing new clemency counsel to other similarly situated individuals, Mr. Jennings was never granted that opportunity. *See* Init. Br. Ex. 1. Without clemency counsel and considering the limitations placed on other collateral representation and pro se litigants, Mr. Jennings was not in a position to reapply on his own accord. *See* Fla. Stat. § 27.7001.

Lastly, the Respondent continues to rely on the language in the

[3] Although the Respondent implies Mr. Martin McClain was his clemency attorney, Vincent Howard held this role. Mr. Howard passed away a decade earlier. Further, because of the secrecy surrounding clemency proceedings, there is

death warrant that Mr. Jennings' clemency was considered and appropriately denied. Although the warrant states that clemency was considered and denied, it does not state who considered and denied it. Mr. Jennings' clemency was denied in 1989. The secrecy that clouds clemency has prevented Mr. Jennings from any further information concerning what Governor DeSantis reviewed, relied on, or considered, if anything, when arbitrarily selecting Mr. Jennings for the execution of the month.

Regardless, the Governor's decision to deny Mr. Jennings clemency was based on wholly incomplete information that covered just one third of his life. Permitting this incomplete clemency review to stand would be a miscarriage of justice that violates Mr. Jennings' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions in the Florida Constitution. This Court must grant a stay of execution and remand for an evidentiary hearing on this largely fact-based claim.

ISSUE II: The Post-Warrant Appointment of Counsel and Failure to Enter a Stay of the Proceedings Renders the Warrant Proceedings Invalid and in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Corresponding Provisions of the Florida Constitution, and

Florida Rules and Statutes.

Florida Rule of Criminal Procedure 3.851 is replete with mandatory language. For instance, the Rule:

> applies to **all postconviction proceedings** that commence on the issuance of the appellate mandate affirming the death sentence to include all motions and petitions for any type of postconviction or collateral relief brought by a defendant in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on appeal.

Fla. R. Crim. P. 3.851(a) (emphasis added). Further, the Rule requires:

> On the issuance of the mandate affirming a judgment and sentence of death on direct appeal, the Supreme Court of Florida **must** at the same time issue an order appointing the appropriate office of the Capital Collateral Regional Counsel or directing the trial court to immediately appoint counsel from the Registry of Attorneys maintained by the Justice Administrative Commission.

Fla. R. Crim. P. 3.851(b)(1) (emphasis added). See also Fla. R. Crim. P. 3.851(b)(2), (3), and (4).[4]

[4] Within 30 days of the issuance of the mandate, the Capital Collateral Regional Counsel or Registry Counsel **must** file either a notice of appearance or a motion to withdraw in the trial court." Fla. R. Crim. P. 3.851(b)(2) (emphasis added). "Within 15 days after Capital Collateral Counsel or Registry Counsel files a motion to

"After the filing of a notice of appearance, Capital Collateral Regional Counsel, Registry Counsel, or a private attorney **must represent the defendant in the state courts until a judge allows withdrawal or until the sentence is reversed, reduced, or carried out, regardless of whether another attorney represents the defendant in federal court**." Fla. R. Crim. P. 3.851(b)(5) (emphasis added).

> A defendant who has been sentenced to death **may not represent himself** or herself in a capital postconviction proceeding in state court. The only basis for a defendant who has been sentenced to death to seek to discharge postconviction counsel in state court **must** be pursuant to statute due to an actual conflict of interest. On a determination of an actual conflict of interest, conflict-free counsel **must** be appointed pursuant to statute.

Fla. R. Crim. P. 3.851(b)(6) (emphasis added).

Florida's rules and statutes call for CCRC to represent all capital postconviction clients in state courts until the sentence is reversed,

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withdraw, the chief judge or assigned just **must** rule on the motion and appoint new postconviction counsel if necessary." Fla. R. Crim. P. 3.851(b)(3) (emphasis added). "In every capital postconviction case, one lawyer **must** be designated as lead counsel for the defendant. The lead counsel **must** be the defendant's primary lawyer in all state court litigation." Fla. R. Crim. P. 3.851(b)(4) (emphasis added).

reduced, or carried out. This is due to the experience level at presenting and litigating capital postconviction cases in state court – a highly specialized skill. The State made this clear by writing the statute to ensure that the counsel Florida has undertaken to provide is competent to handle the complexities of capital postconviction litigation:

> Capital collateral regional counsel appointed pursuant to this section must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings, or any combination of at least five of such proceedings, and must not be disqualified pursuant to § 27.7045.

Florida Statutes, § 27.703 (3).

Each capital collateral regional counsel may employ assistant capital collateral counsel, who "must have participated in five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of such proceedings." Florida Statutes, § 27.704 (1). It is clear from the statute that Florida accepted its duty to those convicted of capital offenses. Even when capital defendants elect to waive postconviction appeals, the state postconviction counsel is appointed.

Post hoc cobbling of a different system is no substitute for the

procedures mandated by the Florida Rules of Criminal Procedure and the Florida Statutes, as well as the rights guaranteed to criminal defendants under the United States and Florida Constitutions.

The State and circuit court seem to believe that there is no right to counsel "between postconviction motions," but this is in direct contradiction to Florida's rules and statutes. State postconviction counsel does not come and go between bouts of litigation. Pursuant to Florida's rules and statutes, state postconviction counsel remains the defendant's counsel until the sentence is reversed, reduced, or carried out. This means that state postconviction counsel remains in touch with the client: counsel visits with the client, stays in contact with his family and friends, as well as prior counsel and expert witnesses. State postconviction counsel continues to obtain records regarding the client from the Department of Corrections and other agencies, continues to monitor developments in the law that may affect the client's case, and continues to investigate to find newly discovered evidence that could affect the client's outcome. Attorneys and investigators employed by the Capital Collateral Regional Counsel offices ***never*** stop working on their clients' cases until the sentence is reversed, reduced, or carried out.

One thing the rules and statutes fail to do is place the onus for ensuring state postconviction counsel is in place on the defendant. The State has enacted these rules and statutes. The State wrote into the rules and statutes that a court must appoint counsel, and if there is a conflict, the court must appoint conflict-free counsel. By attempting to put the responsibility of having state postconviction counsel in place on the defendant, or on federal counsel, the State and the circuit court are rewriting Florida's laws and rules. While the burden is on the defendant to develop and file newly discovered evidence and change in law claims, what the State and the circuit court is doing in this case is denying them the means and opportunity to actually do so.

The warrant selection process is entirely in the hands of the State. The clemency process is entirely in the hands of the State. The State has ample resources and time to determine whether people who are warrant eligible have counsel, and to ensure that counsel is appointed – given the fact that the State has done so previously. In this case, the State knew that Mr. Jennings was not represented in state court. The State moved to have counsel appointed to other men who had been represented by Mr. Jennings' late attorney; the State

had no explanation for why Mr. Jennings was treated differently than the others. The State has all of the power in this proceeding and is exercising it to deprive Mr. Jennings of his constitutional rights.

The Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." Although courts have ruled there is no constitutional right to postconviction counsel, if a state opts to afford postconviction proceedings to indigent inmates, it "must comport with the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Tamalini v. Stewart*, 249 F.3d 895, 902 (9th Cir. 2001); *Smith v. Att'y Gen.*, No. 22-12950, 2023 WL 2592286, at *3 (11th Cir. Mar. 22, 2023) ("There is no federal constitutional right to a direct appeal or to postconviction review by the states, but once such a remedy is granted, its operation must conform to the due process requirements of the Fourteenth Amendment.").

"It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803). The rights set out in Florida Rule of Criminal Procedure 3.851 and Chapter 27 of the Florida Statutes "are *the rights of indigent death row inmates to*

representation, not the right of CCR to represent those inmates." *Durocher v. Singletary*, 623 So. 2d 482, 483 (Fla. 1993) (emphasis supplied), *citing Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988) (the right to counsel "was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings"); *Troedel v. State*, 479 So. 2d 736 (Fla. 1985).

Florida's statutes and rules contain no stated remedy for lapses in representation, such as when a death warrant is signed for a capital defendant who has no appointed counsel familiar with him or his case. This gap in the capital postconviction scheme allows the critical protections mandated by Florida's statutory guarantees to be thwarted. Because of this, Mr. Jennings has not been able to meaningfully access the postconviction process that is his last line of defense after a hastily-signed execution warrant and the post-warrant appointment of completely new state court counsel.

"A right without a remedy for its transgression is no right at all." *Childers v. Floyd*, 642 F.3d 953, 988 (11th Cir. 2011) (Wilson, J. concurring in the judgment). Florida has conferred the right to continuous state postconviction counsel on all death-sentenced defendants. Florida cannot now take that right away without due

process or meaningful access to the courts by knowingly allowing Mr. Jennings to be without state postconviction counsel for years, and by attempting to shift the burden of having state postconviction counsel in place to a powerless inmate (or his federal attorneys) when Florida has undertaken that duty.

This Court must vacate the death warrant, or at the very least, stay the proceedings and allow for Mr. Jennings' rights to due process of law and meaningful access to the courts to be fulfilled.

ISSUE III: Florida's Current Capital-Sentencing Scheme Violates the Eighth and Fourteenth Amendments Because It Lacks the Safeguards Necessary to Ensure the Fair and Reliable Imposition of the Death Penalty.

The State's Response misreads both precedent and the record. It insists that the constitutional infirmities identified in Mr. Jennings' Initial Brief have already been rejected through a series of decisions beginning with *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and culminating in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020); *State v. Poole*, 297 So. 3d 487 (Fla. 2020); *Owen v. State*, 304 So. 3d 238 (Fla. 2020); *Patton v. State*, 326 So. 3d 1183 (Fla. 2021); *Fletcher v. State*, 333 So. 3d 123 (Fla. 2022); *Dailey v. State*, 283 So. 3d 782 (Fla. 2019); and *Zakrzewski v. State*, 335 So. 3d 736 (Fla. 2022). The

State further asserts that *McKinney v. Arizona*, 140 S. Ct. 702 (2020), confirms the correctness of *Poole* and the Florida Supreme Court's subsequent refusal to reconsider it.

Those arguments misconstrue both the scope and substance of the claims raised by Mr. Jennings. None of the cases the State cites evaluated Florida's capital punishment framework as it stands today. Through recent decision, Florida's system has devolved; it combines non-unanimous jury recommendations, the elimination of proportionality review, and an opaque warrant process while adding new crimes and aggravators, making it easier than ever for a criminal defendant to be sentenced to death – rather than narrowing death-eligibility to the worst of the worst, Florida has expanded the categories to include criminals who were categorially excluded from a death sentence mere years ago. Florida also continues to operate under a clemency structure cloaked in secrecy and that allows cases to remain dormant for decades. The authorities on which the State relies addressed different questions at different times, and none confronted the cumulative constitutional breakdowns now before this Court.

The State argues that the constitutionality of Florida's death-

penalty framework is settled by *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020); *State v. Poole*, 297 So. 3d 487 (Fla. 2020); and their progeny, asserting that this Court has repeatedly declined to reconsider those decisions. That position ignores the limited scope of those cases and their inapplicability to Florida's current statutory and procedural reality.

In *Lawrence*, this Court eliminated proportionality review, holding that the Eighth Amendment does not require comparative evaluation of death sentences. *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). But *Lawrence* did not, and could not, address the combined effect of that elimination with the Legislature's 2023 amendment to Florida Statutes, § 921.141(2), which authorized death recommendations by an 8–4 vote. The resulting framework now permits divided juries to recommend death without any statewide review for consistency. As Justice Labarga cautioned, abolishing proportionality review "threatens the fundamental fairness of capital sentencing and leaves this Court powerless to ensure the evenhanded administration of death." *Lawrence*, 308 So. 3d at 552 (Labarga, J., dissenting).

The State's reliance on *Poole* and *Owen* fares no better. *Poole*

receded from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and held that unanimous jury recommendations are not constitutionally required. *State v. Poole*, 297 So. 3d 487, 503–04 (Fla. 2020). In *Owen*, this Court relied on *McKinney v. Arizona*[5] to conclude that *Poole* correctly interpreted *Hurst v. Florida*[6] and that *McKinney* supported the decision to recede from the additional requirements imposed by *Hurst v. State*. *Owen v. State*, 304 So. 3d 238, 241 (Fla. 2020). But *McKinney* involved Arizona's post-*Ring*[7] appellate reweighing procedure and addressed only whether a state appellate court could reweigh aggravation and mitigation - not whether non-unanimous jury recommendations, the absence of proportionality review, or a secretive warrant process satisfy the Eighth Amendment's heightened reliability requirement. *McKinney v. Arizona*, 140 S. Ct. 702 (2020).

Thus, neither *Poole* nor *Owen*, nor any of the other cases the State cites, resolved the question at the heart of this appeal: whether Florida's capital system, as it currently functions, comports with the

[5] 589 U.S. 139 (2020)
[6] 577 U.S. 92 (2016)
[7] *Ring v. Arizona*, 536 U.S. 584 (2002).

constitutional command that death be imposed fairly, consistently, and reliably. *Furman v. Georgia*, 408 U.S. 238 (1972). Those cases addressed narrower issues under different conditions; they cannot insulate a system that now lacks the basic safeguards once relied upon to uphold its constitutionality.

The State's attempt to minimize Florida's failures in clemency, representation, and warrant selection overlooks undisputed facts and established constitutional principles demanding transparency and fairness.

The record shows that Mr. Jennings' clemency proceeding occurred thirty-six years ago, and there is no evidence it was ever revisited in a **meaningful** way. Florida's clemency framework shields all records and decisions from public view, preventing the condemned or the courts from knowing whether any review or reconsideration has occurred. Art. IV, § 8(a), Fla. Const.; §§ 14.28, 940.031, Fla. Stat. The State does not dispute this; instead, it characterizes clemency as a purely discretionary executive function beyond judicial concern. That argument misreads *Harbison v. Bell*,[8] which recognizes

[8] 556 U.S. 180, 189-90 (2009).

clemency as the "fail-safe" in the capital system. When a clemency process is both dormant and hidden, it ceases to be a safeguard and becomes an instrument of arbitrariness.

This constitutional failure is compounded by Florida's persistent neglect in ensuring continuous and competent postconviction representation. After the death of his prior attorney, Mr. Jennings was left without state postconviction counsel for more than three years, in violation of Florida Statutes, §§ 27.7001 and 27.711(2), as well as Florida Rule of Criminal Procedure 3.851(b)(5), which require uninterrupted representation for capital defendants until the sentence is reversed, reduced, or carried out. Although the State argues that Mr. Jennings was represented by the federal Capital Habeas Unit ("CHU"), the State knows that the CHU cannot appear as lead counsel on *state* postconviction matters.[9] Only after the Governor signed a death warrant was new state postconviction counsel appointed, leaving them mere days to review a forty-six-year record and tens of thousands of pages of files. Appointing counsel

[9] *See*, *Harbison*, *supra*; *Booker v. Sec'y, Fla. Dep't of Corr.*, 22 F.4th 954, 959 (11th Cir. 2022); *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1213 (11th Cir. 2014); *See also*, 18 U.S.C. § 3599(a)(2).

under such conditions is little better than no counsel at all. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). The Eleventh Circuit likewise observed that "[r]eliability in the fact-finding aspect of sentencing has been a cornerstone" of death-penalty jurisprudence. *Proffitt v. Wainwright*, 685 F.2d 1227, 1253 (11th Cir. 1982). The State's insistence that this deprivation is harmless disregards the structural nature of the violation: for years, there was no advocate to protect Mr. Jennings' rights, monitor developments in the caselaw, or to develop new mitigation evidence.

Florida's warrant-selection process exacerbates these constitutional defects. The Governor alone determines who among more than two hundred warrant-eligible prisoners will be executed and when. This is done without statutory criteria, without notice to the prisoner or counsel, and without opportunity for judicial review. The wall behind which the warrant decision takes place makes it impossible for counsel to protect the client's constitutional rights. The State's suggestion that this discretion is unproblematic conflicts with the Eighth Amendment's requirement that capital punishment be administered through "clear and objective standards" that ensure consistency and rationality. *Godfrey v. Georgia*, 446 U.S. 420, 428

(1980). The unchecked nature of Florida's warrant process, combined with a thirty-six-year silence in clemency, and intermittent representation, results in precisely the wanton and freakish imposition of death condemned in *Furman v. Georgia*. 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

These interlocking failures reveal a system that no longer functions as a constitutional mechanism for imposing the death penalty but as a structure of arbitrary power. The Eighth and Fourteenth Amendments demand more than procedural formality; they require a process that reliably distinguishes those most deserving of death from those for whom mercy or mitigation is warranted. Florida's current regime, as applied here, does neither.

Florida's death-penalty framework, as it now operates, bears little resemblance to the system evaluated in *Lawrence*, *Poole*, or *Owen*. The combined effect of non-unanimous jury recommendations, elimination of proportionality review, the expansion of the death-eligible class, and unchecked executive discretion has rendered the process arbitrary and unreliable in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U.S. 238 (1972); *Eddings v. Oklahoma*, 455 U.S. 104

(1982).

This Court should reverse the order below, vacate Mr. Jennings' death sentence, or at minimum stay his execution until these constitutional defects are cured.

CONCLUSION

Based on his arguments, Mr. Jennings respectfully requests that this Court remand his case for an evidentiary hearing, vacate his sentences of death, and/or grant a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 3rd day of November 2025, the foregoing was electronically filed with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: the **Honorable Kelly J. McKibben**, **Circuit Judge**, Eighteenth Judicial Circuit, Brevard County Courthouse, 2825 Judge Fran Jamieson Way, Viera, Florida 32940, tracie.orman@flcourts18.org; **Will Scheiner, State Attorney**, Eighteenth Judicial Circuit, 2725 Judge Fran Jamieson Way, Viera, Florida 32940, wscheiner@sa18.org; **Linda McDermott, Chief Federal Public Defender**, Office of the Federal Public Defender – Northern District, 227 N. Bronough Street, Suite 4200, Tallahassee, Florida 32301, linda_mcdermott@fd.org; **Kristen Lonergan, Executive Senior Attorney**, Florida Department of Corrections, 501 South Calhoun Street, Tallahassee, Florida 32399, kristen.lonergan@fdc.myflorida.com, **Christina Porrello, FDOC Senior Attorney**, christina.porrello@fdc.myflorida.com**, Secretary Ricky Dixon**, ricky.dixon@fdc.myflorida.com, and courtfilings@fdc.myflorida.com; **Jonathan Tannen, Senior Assistant Attorney General**, Office of the Attorney General, 3507 E

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CERTIFICATE OF COMPLIANCE

We hereby certify that the Initial Brief has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief does not exceed 6,500 words or 25 pages.

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