In the Supreme Court of Florida

HARRY JONES,

Appellant,

v. CASE NO. SC17-1385

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, HARRY JONES, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by the appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

On April 5, 2016, Harry Jones, represented by registry counsel Linda McDermott, filed a successive habeas petition in the Florida Supreme Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On March 17, 2017, this Court denied the habeas petition on non-retroactivity grounds. *Jones v. Jones*, SC16-607 (Fla. March 17, 2017). This Court's order denying the petition provides in its entirety:

> The petition for writ of habeas corpus is hereby denied. *See Asay v. State*, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016). It is so ordered.

On January 11, 2017, Jones, despite having a habeas petition pending in this Court, filed a successive 3.851 motion in the trial court raising four claims based on *Hurst v. Florida* and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). On May 24, 2017, the trial court held a case management conference. On June 8, 2017, the trial court summarily denied the successive postconviction motion because "the Florida Supreme Court has previously rejected the *Hurst* claim." The trial court explained that under the law-of-the-case doctrine, all questions of law

decided on appeal govern the case through "all subsequent stages of the proceedings" citing *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001). The trial court concluded that because "the Florida Supreme Court has already rejected this *Hurst* claim in *Jones v. Jones*, SC16-607 (Fla. March 17, 2017), the law-of-the-case doctrine controls." Alternatively, the trial court explained that, because Jones' sentence was final years before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, he was not entitled to any *Hurst* relief under this Court's controlling precedent of *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Gaskin v. State*, 218 So.3d 399 (Fla. 2017). The trial court also ruled that because "all of the claims raised in the successive postconviction motion emanate from *Hurst*, Jones is not entitled to any relief on any of the claims."

Jones then appealed the denial of his successive postconviction *Hurst* motion to this Court. *Jones v. State*, SC17-1385. On September 25, 2017, this Court issued an order for Jones to show cause why *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied, Hitchcock v. Florida*, 138 S.Ct. 513 (2017), did not control in that appeal. On November 18, 2017, Jones filed a response. On November 21, 2017, the State filed a reply to the response to the order to show cause. On December 4, 2017, Jones filed a reply to the State's reply.

On February 22, 2018, this Court ordered additional briefing on the non-*Hurst* claims. On April 6, 2018, Jones filed his supplemental answer brief on the non-*Hurst* claims. This is the State's supplemental answer brief on the non-*Hurst* claims.

SUMMARY OF ARGUMENT

ISSUE I

Jones asserts that the penalty phase jury instructions diminished the jury's sense of responsibility by referring to the jury's recommendation of a sentence as advisory in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The *Caldwell* claim was not raised below and therefore, is not properly preserved. Alternatively, it is meritless. For a *Caldwell* violation to occur, the jury instructions or comments must be a misrepresentation of the jury's role in capital sentencing. Accurate descriptions of the jury's role do not violate *Caldwell*. In Florida, a jury's recommendation of death was, and remains, advisory. A trial court in Florida, under both the old death penalty statute and the new death penalty statute, is free to ignore a jury's recommendation of death and impose a life sentence. And such a decision is not even appealable, therefore, the characterization of a jury's role as advisory is accurate. Furthermore, Florida's current death penalty statute, amended in the wake of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), refers to the jury's recommendation as advisory. Jury instructions that track the actual language of the statute are necessarily accurate descriptions of the jury's role under state law and therefore do not violate *Caldwell*. Additionally, this Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in two recent cases. The trial court properly summarily denied the successive postconviction motion.

ISSUE II

Jones also asserts that *Hurst* somehow resurrects his previously denied newly discovered evidence claim. It does not. This claim is procedurally barred by the law-of-the-case doctrine. This Court rejected the claim of newly discovered evidence of Kevin Prim's statements to others that his trial testimony was false as

being unlikely to produce an acquittal on retrial because it was "merely impeachment evidence" of a witness who had already been "significantly impeached at trial" and because of the other inculpatory evidence apart from the challenged testimony. This Court previously rejected this claim and nothing in *Hurst* changes any of that analysis. The trial court properly summarily denied this claim.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE *CALDWELL V. MISSISSIPPI*, 472 U.S. 320 (1985), CLAIM ? (Restated)

Jones asserts that the penalty phase jury instructions diminished the jury's sense of responsibility by referring to the jury's recommendation of a sentence as advisory in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). SIB at 11. The *Caldwell* claim was not raised below and therefore, is not properly preserved. Alternatively, it is meritless. For a *Caldwell* violation to occur, the jury instructions or comments must be a misrepresentation of the jury's role in capital sentencing. Accurate descriptions of the jury's role do not violate *Caldwell*. In Florida, a jury's recommendation of death was, and remains, advisory. A trial court in Florida, under both the old death penalty statute and the new death penalty statute, is free to ignore a jury's recommendation of death and impose a life sentence. And such a decision is not even appealable, therefore, the characterization of a jury's role as advisory is accurate. Furthermore, Florida's current death penalty statute, amended in the wake of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), refers to the jury's recommendation as advisory. Jury instructions that track the actual language of the statute are necessarily accurate descriptions of the jury's role under state law and therefore do not violate *Caldwell*. Additionally, this Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in two recent cases. The trial court properly summarily denied the successive postconviction motion.

Not preserved

This issue is not preserved. Opposing counsel did not raise a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), claim below. While opposing counsel cited *Caldwell* in support of the first claim, no separate *Caldwell* claim was raised. (Second Succ. ROA 49, n.26, 51-52, 55). Specifically, the claim that was raised below as claim I was a Sixth Amendment claim entitled "JONES' DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT UNDER *HURST V. FLORIDA*." But that claim is a Sixth Amendment right-to-a-jury-trial claim; whereas, *Caldwell* is an Eighth Amendment claim. Merely citing a case under the rubric of another issue is not sufficient to preserve a claim. Just as a federal habeas petitioner cannot "scatter some makeshift needles in the haystack" of the record or make "oblique references which hint that a theory may be lurking in the woodwork," to properly exhaust a claim, a postconviction movant cannot raise a claim in state court merely by citing a case inside a totally different claim. *McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005). The *Caldwell* issue is not preserved.

The trial court's ruling

The trial court ruled that because "all of the claims raised in the successive postconviction motion emanate from *Hurst*, Jones is not entitled to any relief on any of the claims." The trial court, however, did not specifically rule on a *Caldwell* claim because the claim was not raised as an independent claim in the trial court.

Standard of review

When a trial court summarily denies a claim in a postconviction motion, this Court reviews that ruling *de novo*. *Pardo v. State*, 108 So.3d 558, 561 (Fla. 2012). Because a trial court's decision to summarily deny a postconviction motion is

"ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013). The standard of review is *de novo*.

Merits

There was no violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *see also Dugger v. Adams*, 489 U.S. 401 (1989).

Even today, under Florida's new death penalty statute, the judge remains the final sentencer in Florida and a jury recommendation of death in Florida is just that — a recommendation. The Florida's new death penalty statute refers to the jury's vote as a "recommendation." Ch. 2017-1, § 1, Laws of Fla. ("If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death."); *see also In re Standard Criminal Jury Instructions in Capital Cases*, 214 So.3d 1236, 1238, n.4 (Fla. 2017) (Lawson, J., concurring) (stating: "the jury's verdict is only a recommendation"). A Florida trial court, while bound by the jury's findings of no aggravation, is still free to reject the jury's death recommendation of death and impose a life sentence. And such a decision is not even appealable under double jeopardy. *Williams v. State*, 595 So.2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase citing *Brown v. State*, 521 So.2d 110 (Fla. 1988)); *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting a judge's decision to override a jury's recommendation of death is not appealable). Unless this Court is going to recede from *Williams* and *Brown*

and hold that a judge must impose a death sentence if the jury recommends a death sentence and may not impose a life sentence instead, then characterizing the jury's recommendation as advisory is accurate. The jury's recommendation in Florida was, and remains, "advisory."

Recent Florida Supreme Court precedent

This Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in two recent cases. *Reynolds v. State*, __ So.3d __, 2018 WL 1633075 (Fla. Apr. 5, 2018) (SC17-793); *see also Johnston v. State*, 2018 WL 1633043 (Fla. Apr. 5, 2018) (SC17-1678) (rejecting a *Caldwell* claim citing *Reynolds*). The *Reynolds* decision contains an extensive discussion of the *Caldwell* issue. Only Justice Pariente dissented in *Reynolds* regarding the *Caldwell* claim. *Reynolds*, 2018 WL 1633075 at *15-*17 (Pariente, J., dissenting). Justice Pariente believes that the use of the word "advisory" creates a possible *Caldwell* problem but, as explained above, it does not. Only Justice Quince dissented in *Johnson* and she did so regarding harmless error, not *Caldwell*.

Recent United States Supreme Court dissents on *Caldwell*

Two United States Supreme Court Justices have expressed the view that *Caldwell* is an issue in Florida in non-final capital cases.[1] *Truehill v. Florida*, 138 S.Ct. 3 (Oct. 16, 2017) (Sotomayor, J., dissenting from the denial of certiorari) (advocating that the Florida Supreme Court revisit its precedent rejecting *Caldwell*

[1] Justice Breyer's separate opinion was based mainly on his view that the Eighth Amendment requires jury sentencing in capital cases - a view no other Justice has taken. While he purports to join the dissenters, he does so on separate grounds. He cannot be said to agree with Justice Sotomayor that there is a *Caldwell* problem with the Florida Supreme Court's harmless error analysis.

challenges to the use of the term "advisory" to describe the jury's recommendation in the wake of *Hurst*); *Middleton v. Florida*, 138 S.Ct. 829 (Feb. 26, 2018) (Sotomayor, J., dissenting from the denial of certiorari) (expressing the view that describing a juror's role in sentencing as "merely advisory" is a *Caldwell* concern and because the Florida Supreme Court's reasoning that "unanimity ensured that jurors had made the necessary findings of fact" under *Hurst* "effectively" transforms "the pre-*Hurst* jury recommendations into ***binding*** findings of fact") (emphasis added). Justice Sotomayor repeated her concerns alone recently in *Guardado v. Jones*, 138 S.Ct. 1131 (April 2, 2018) (Sotomayor, J., dissenting from the denial of certiorari).[2]

But *Caldwell* requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing. *Darden v. Wainwright*, 477 U.S. 168, 183, n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell* is relevant only to certain types of comment — those that ***mislead*** the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision") (emphasis added). But the new death penalty statute refers to the jury's decision as a "recommendation." Ch. 2017-1, § 1, Laws of Fla. There is no misrepresentation of the jury's role under local law from use of the word "advisory." Under *Romano*, that statutory language, in and of itself, ends any *Caldwell* claim.

Furthermore, it is difficult to see a *Caldwell* problem with the standard jury instructions given in capital cases, Standard Jury Instruction 7.11 (Penalty Proceedings — Capital Cases. The standard penalty phase jury instructions inform the jury: "Before you ballot you should carefully weigh, sift, and consider the evidence, and all of it, realizing that ***human life is at stake***." *In re Standard*

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[2] Neither Justice Breyer nor Justice Ginsburg joined Justice Sotomayor in *Guardado*, as they had previously done.

Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d 17, 36 (Fla. 2009) (emphasis added). The standard penalty phase instructions also inform the jury: "Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given ***great weight*** and deference by the Court in determining which punishment to impose." *In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2*, 22 So.3d at 28-29 (emphasis added). The jury instructions provide: "All of us are depending upon you to make a wise and legal decision in this matter." *Id.* at 30. At the end of the instructions, the jury is told that "Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death." *Id.* at 35. "You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned recommendation." *Id.* at 36. It is difficult to see how a jury would underestimate its importance in capital sentencing given such instructions.

But Justice Sotomayor shows an even deeper misunderstanding of the logic of *Caldwell*. *Caldwell* requires both that there be a misrepresentation of the jury's role and that the jury hear that misrepresentation. The jury must hear misrepresentation for their sense of responsibility to be diminished, which is the core of *Caldwell*. The jury, obviously, never heard the Florida Supreme Court's opinion. This Court made its observations and statements that concern Justice Sotomayor as part of its harmless error analysis of the *Hurst* error in *Truehill* and *Middleton*. She believes that this Court turned the recommendation into a binding one by its harmless error analysis. But an appellate court's harmless error analysis occurs long after the jury has been dismissed. Also, harmless error is an appellate concept which occurs in a different forum — trial court versus appellate court. One simply cannot premise a *Caldwell* violation on something the jury never heard. The jury never heard anything written by this Court. No one read

the Florida Supreme Court's opinion (that had not been written yet) to the jury. There simply is no way the jury's sense of responsibility was diminished by statements made in an appellate opinion they never read. It is the standard jury instruction that the jury hears, not the opinion from this Court. *Caldwell* violations cannot be premised on appellate opinions.

Additionally, the misrepresentation must ***decrease*** the jury's sense of responsibility for sentencing to be a *Caldwell* violation. A misrepresentation of their role that ***increases*** their sense of responsibility is not a *Caldwell* problem. The juries in Florida are told in the standard penalty phase jury instructions that the judge would give their recommendation ***great*** weight including their recommendation of death. While the instructions tell the jury that any type of recommendation they make will be given great weight, in fact, the judge does not have to give a jury's death recommendation any weight and a judge totally ignoring the jury recommendation is not even appealable regardless of how unjustified his reasons for doing so are. If anything, Florida's standard penalty phase jury instructions increase the jury's sense of responsibility which simply is not a *Caldwell* violation.

Furthermore, Justices Sotomayor and Ginsburg are mistaken in believing that a jury's death recommendation is "binding" on a trial court in Florida. It is not. Under neither the old death penalty statute nor the new death penalty statute, a judge may still sentence a defendant to life, if the jury recommends death. Unanimous jury recommendations of death are not any more binding on the trial court than non-unanimous recommendations. A jury's recommendation of death is binding in any manner. And therefore, it is perfectly accurate to refer to the jury's recommendation of death as either a recommendation or as advisory, because that is exactly what it is. There is both no misrepresentation and no jury knowledge of the statement and therefore, no possible *Caldwell* problem. The

entire premise of the dissent is based on the statement that "If those then-advisory jury findings are now binding" there is a *Caldwell* problem because the jury instructions "repeatedly emphasized the nonbinding, advisory nature of the jurors' role." *Middleton*, 138 S.Ct. at 830. But that premise is faulty. Harmless error analysis cannot create "binding" findings.

The trial court properly summarily denied the successive postconviction motion.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE NEWLY DISCOVERED EVIDENCE CLAIM? (Restated)

Jones also asserts that *Hurst* somehow resurrects his previously denied newly discovered evidence claim. SIB at 16. It does not. This claim is procedurally barred by the law-of-the-case doctrine. This Court rejected the claim of newly discovered evidence of Kevin Prim's statements to others that his trial testimony was false as being unlikely to produce an acquittal on retrial because it was "merely impeachment evidence" of a witness who had already been "significantly impeached at trial" and because of the other inculpatory evidence apart from the challenged testimony. This Court previously rejected this claim and nothing in *Hurst* changes any of that analysis. The trial court properly summarily denied this claim.

The trial court's ruling

The trial court ruled that because "all of the claims raised in the successive postconviction motion emanate from *Hurst*, Jones is not entitled to any relief on any of the claims."

Standard of review

When a trial court summarily denies a claim in a postconviction motion, this Court reviews that ruling *de novo*. *Pardo v. State*, 108 So.3d 558, 561 (Fla. 2012). Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013); *Staples v. State*, 202 So.3d 28, 32 (Fla. 2016) (explaining that

"where the issue presented is a question of law, the standard of review is *de novo*"). The standard of review is *de novo*.

Prior ruling

On April 11, 2005, Jones filed a successive postconviction rule 3.851 motion regarding newly discovered evidence of Kevin Prim's statements to others that his trial testimony regarding Jones' confession was false. (PC-R. 888-911). On June 18, 2007, Jones filed an amended successive postconviction motion. On May 11, 2009, the trial court summarily denied the successive motion.

On appeal, the Florida Supreme Court affirmed the trial court's summary denial. This Court wrote:

> Harry Jones, a prisoner under sentence of death, appeals the summary denial of his supplemental and successive motions for postconviction relief under Florida Rule of Criminal Procedure 3.851. We previously affirmed Jones' conviction and death sentence on direct appeal. *Jones v. State*, 648 So.2d 669, 672 (Fla. 1994), *cert. denied* 515 U.S. 1147 (1995). We also affirmed the denial of Jones' initial motion for postconviction relief and denied his petition for a writ of habeas corpus. *Jones v. State*, 998 So. 2d 573, 590 (Fla. 2008). In 2005 and 2007, respectively, Jones filed supplemental and successive postconviction motions challenging his conviction and sentence, alleging newly discovered evidence and violation of his due process rights. On July 9, 2009, the postconviction court summarily denied Jones' motions. We affirm.
>
> Jones first challenges the postconviction court's adoption of the State's proposed order, alleging that such adoption violated his due process rights. However, Jones failed to preserve this issue and as such cannot raise it for the first time on appeal. See, e.g., *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993). Additionally, this Court has previously held that no due process violation exists where a postconviction court substantially adopts the State's proposed order as long as the appellant was afforded the opportunity to review and object to the State's proposed order. See, e.g., *Valle v. State*, 778 So. 2d 960, 964-65 (Fla. 2001). Jones was afforded such an opportunity.
>
> Jones also challenges the postconviction court's summary denial of his 2005 and 2007 motions as untimely and without merit. To prove timeliness of a rule 3.851 claim filed more than one year after the defendant's conviction and sentence become final, the defendant must show that the alleged newly discovered evidence was unknown and "could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2).

> Although the postconviction court may have erred in denying Jones' 2005 supplemental motion as untimely, any error was harmless, since the postconviction court correctly denied both motions on the merits. Jones' alleged newly discovered evidence is not of such a character that it is likely to produce an acquittal on retrial. The alleged newly discovered evidence is merely impeachment evidence directed at a witness who was significantly impeached at trial. Moreover, the totality of inculpatory evidence apart from the challenged testimony supports Jones' conviction and sentence. Accordingly, we affirm the postconviction court's summary denial of Jones' 2005 supplemental and 2007 successive postconviction claims.

Jones v. State, No. SC09-1560 (Fla. Oct. 15, 2010).

Procedural bar

Opposing counsel asserts that *Hurst* somehow resurrects Jones' previously denied postconviction claims. *Hurst v. State*, which is a right-to-a-jury-trial and an Eighth Amendment unanimity case, does not operate to breathe new life into previously denied newly discovered evidence claims, or previously denied *Brady v. Maryland*, 373 U.S. 83 (1963), claims or previously denied *Strickland v. Washington*, 466 U.S. 668 (1984), claims. *Hurst* is not a right to counsel case as is *Strickland*. Nor is it a due process case as is *Brady*. *Hurst* involves an entirely different constitutional right than either *Strickland* or *Brady*. There has not even been a change on the law regarding the additional claim. *Hurst* entitles a defendant to litigate a *Hurst* claim, not other types of claims.

Under the law-of-the-case doctrine, all questions of law decided on appeal govern the case through all subsequent stages of the proceedings. *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001). The newly discovered evidence claim is procedurally barred by the law of the case doctrine.

Opposing counsel, relying on a brew of *James v. State*, 615 So.2d 668 (Fla. 1993), and the manifest injustice exception to the doctrine, asserts that this Court should revisit the postconviction claim. But opposing counsel is really asserting that this Court should recede from *Asay v. State*, 210 So.3d 1 (Fla. 2016), and

Hitchcock v. State, 226 So.3d 216 (Fla. 2017), and rely on *James* instead. She is asserting that this Court should adopt Justice Lewis' dissenting opinion regarding the retroactivity of *Hurst*. *Asay*, 210 So.3d at 30 (Lewis, J., concurring) (relying on the logic of *James*). But, if a case is not retroactive, then the defendant is entitled to NO relief, which includes no new postconviction proceedings. Non-retroactivity is not an exception to the law-of-the-case doctrine.

The newly discovered evidence claim is procedurally barred by the law of the case doctrine and this Court should not revisit the newly discovered evidence claim.

Merits

If this Court revisits the issue, it should once again reject the newly discovered evidence claim for the same reasons. Just as this Court concluded in the prior appeal, "Jones' alleged newly discovered evidence is not of such a character that it is likely to produce an acquittal on retrial." *Jones v. State*, No. SC09-1560, *2 (Fla. Oct. 15, 2010). And, as this Court previously observed, the "alleged newly discovered evidence is merely impeachment evidence directed at a witness who was significantly impeached at trial." *Id*. Additionally, as this Court previously concluded, the "totality of inculpatory evidence apart from the challenged testimony supports Jones' conviction and sentence." *Id*. All of this Court's original reasoning rejecting the claim remains valid in the wake of *Hurst*.

Remedy

Opposing counsel is asserting that any subsequent change in the law regarding the right to a jury trial means that all postconviction proceedings must be redone. But the remedy for a violation of the right to a jury trial is a new trial,

not a new postconviction appeal. There is no connection between the purported error and the proposed remedy.

Accordingly, the trial court properly summarily denied the successive postconviction motion.

CONCLUSION

The State respectfully requests that this Court affirm the trial court's summary denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL ANSWER BRIEF has been furnished by electronic mail via the e-portal to Linda McDermott of McClain & McDermott, P.A., 141 NE 30th St., Wilton Manors, FL 33334-1064; phone: (850) 322-2172; email: lindammcdermott@msn.com this 25th day of April, 2018.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12-point font.

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