IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1385

LOWER TRIBUNAL No. 91-CF-1932

HARRY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

This appeal arises from the summary denial of a successive motion to vacate. A summary denial of a 3.851 motion is subject to de novo review by this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Jones has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Jones, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE[1]

In 1991, Harry Jones was indicted for first-degree murder, robbery and grand theft (R. 1-2). Trial commenced in May, 1992. The jury was unable to reach a verdict and a mistrial was declared. Jones was tried again in November 1992 and the jury returned a guilty verdict on all counts (R. 786-90). After the penalty phase, the jury recommended a sentence of death by a vote of 10 - 2. Jones was sentenced to death (R. 828-36).

This Court affirmed Jones' convictions and sentences on direct appeal. *Jones v. State*, 648 So. 2d 669 (Fla. 1994). The U.S. Supreme Court denied certiorari. *Jones v. Florida*, 515 U.S. 1147 (1995).

In March, 1997, Jones filed a Rule 3.851 motion. After amending the motion. An evidentiary hearing was held on a few of Jones' claims in April, 2004.

After the evidentiary hearing, Jones filed a Supplemental Rule 3.851 motion. However, the circuit court did not address the

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[1]The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R. __" - record on direct appeal to this Court;
"T. __" - transcript of trial proceedings;
"PC-R. __" - record on appeal from the denial of Mr. Jones initial postconviction motion;
"2PC-R. __" - record on appeal from the summary denial of Mr. Jones' supplemental 3.851 motions;
"3PC-R. __" - record on appeal from the summary denial of relief of Mr. Jones' successive motion for postconviction relief;
"4PC-R. __" - record on appeal from the summary denial of relief of Mr. Jones' successive motion for postconviction relief.

motion and instead denied Jones' amended Rule 3.851 on September 23, 2005. Jones filed a timely notice of appeal.

Simultaneously with his initial brief, Jones filed a petition for writ of habeas corpus. This Court denied all relief on December 23, 2008. *Jones v. State*, 998 So. 2d 573 (Fla. 2008).

Following the affirmance of the denial of his amended Rule 3.851 motion, Jones sought to have the claims in his supplemental Rule 3.851 motions heard (2PC-R. 281-4). Ultimately, the circuit court denied Jones' motions (2PC-R. 388).

Jones appealed (2PC-R. 356-7). This Court denied relief in an order issued on October 15, 2010. *Jones v. State*, Florida Supreme Court Case No. SC09-1560.

On February 10, 2009, Jones filed a federal petition for writ of habeas corpus federal district court.

On November 23, 2010, Jones filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009) (3PC-R. 1-44). The circuit court denied the motion (3PC-R. 152-89), and this Court affirmed. *Jones v. State*, 141 So. 3d 132 (Fla. 2012).

On October 1, 2013, the federal district court denied Jones' petition for writ of habeas corpus. *Jones v. McNeil*, 2013 WL 5504371. And, the Eleventh Circuit Court of appeals affirmed on August 25, 2016. *Jones v. Sec'y, Dept. Of Corrs.*, 834 F.3d 1299 (11th Cir. 2016).

On April 5, 2016, Jones filed a successive petition for writ of habeas corpus. This Court denied the petition in an order on

March 17, 2017. *Jones v. Jones*, Florida Supreme Court Case No. SC16-607.

On January 11, 2017, Jones filed a successive Rule 3.851 motion (4PC-R. 16-67). On June 8, 2017, the circuit court denied the motion (4PC-R. 86-8). Jones timely filed a notice of appeal (4PC-R. 118-9).

STATEMENT OF THE FACTS

A. THE TRIAL PROCEEDINGS

George Young, Jr., and Harry Jones were together on June 1, 1991. They met in the early evening at Market Street Liquors: Jones had been drinking all day with Timothy Hollis and returned to the liquor store to purchase more alcohol (T. 276, 328, 331-2). Hollis was very intoxicated and Jones helped him to the bathroom (T. 277). Shortly thereafter, Young, entered the store (*Id.*), at approximately 7:00 p.m., to buy liquor (T. 285). Jones came back to the counter and purchased another half pint of gin (T. 285, 297). Young also bought a half pint of gin and (T. 278), and offered to assist Jones (T. 279-80).

Ultimately, Young drove Hollis home with Jones (T. 338). And, after dropping off Hollis, Young and Jones left the house together (T. 338). Indeed, between 7:30 and 8:00 p.m., the pair was seen together at the Suwanee Swifty (T. 347). The two entered the store, bought a six pack of beer and left (T. 348).

At approximately 8:00 p.m. Deputy David Frimmel saw Young's truck on Meridian Road. *See* T. 375-82. When he saw the truck, it was occupied by a single black male (T. 376).

At 8:10 p.m., Florida Highway Patrol Trooper Don Ross responded to an car accident on Meridian Road. Jones was lying on the road and several individuals were gathered around trying to assist him (T. 354). Jones was transported to the hospital (T. 358).

The following day, Jones denied that he had obtained the truck from a white man (T. 514).

On June 6, 1991, the body of Young was found in Boat Pond (T. 521). The cause of death was drowning (T. 665).[2]

Though the time frame between Jones and Young's meeting until Jones' car accident was under an hour, a detective testified that travel from the liquor store to all of the stops Jones and Young made and could possibly be done between fifty-three and fifty-eight minutes, depending on the route traveled (T. 533). However, this estimate only considered the driving time, and not the time spent at any given stop (T. 556).

In order to bolster its case, the State presented the testimony of a seasoned jail house snitch, Kevin Prim. Prim contacted law enforcement and ultimately testified that Jones confessed to him (T. 533; 680).[3] Both Prim and Detective Wood

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[2]The pathologist could not say whether Young was conscious at the time of the drowning (T. 668-9).

[3]Jay Watson testified that he had heard Prim ask Jones about his case and that Jones responded that he had killed a man and that was the reason why he was in jail (T. 701). Watson never heard Jones tell Prim any more about his case (T. 701-2). But, Watson had also seen Prim go through Jones' legal papers when Jones was out of the cell (T. 715).

Watson did not reveal the information about hearing Jones' statement to Prim until after he had been convicted of

testified that Prim was neither offered nor expected any benefits (T. 533-7; 678; 688-9).

To counter Prim, Jones presented the testimony of Ramone Roberts who had been incarcerated with Jones, Prim and Watson. Prim had asked Roberts about his case, but Roberts would not speak to him (T. 726). Roberts confirmed that Prim had read Jones' legal documents when Jones was not in the cell (T. 727).

At the penalty phase proceeding, the State relied upon the evidence previously introduced and entered into the record certified judgment and sentence reports of a 1977 conviction for two counts of armed robbery with a pistol, and a 1984 conviction for armed robbery with a firearm and kidnapping (R. 949-52).

Jones and his sister testified for the defense. Betty Jones Stuart explained that she was a police officer with the Metro Dade Police Department (R. 953), and she briefly testified about Jones' family background. *See* R. 953-6.

And, Jones told the jury that on May 31, 1991, he and Timothy Hollis drank most of the night until about 5:00 a.m. (R. 961-2). He began drinking that same morning at about 8:00 a.m. and drank continuously throughout the day (R. 964-5). Following the accident, Jones blood alcohol was measured at .269 (R. 966).

The jury recommended death by a 10 - 2 vote (R. 785).

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trafficking cocaine (T. 820). His sentencing was postponed until he testified against Jones (*Id.*). Watson was facing a life sentence, as a habitual felony offender (T. 821), but received a ten year sentence (T. 826). Watson was aware that his involvement in Jones' case could benefit him (T. 823).

On November 20, 1992, the trial court sentenced Jones to death, finding three aggravating circumstances, though the jury was instructed as to five. The trial court found that Jones had committed a prior violent felony; that the murder was committed during the course of a robbery; and that the murder was heinous, atrocious and cruel (R. 828-37). The trial court gave some weight to the statutory mitigator that at the time of the crime, Jones capacity to appreciate the criminality of his conduct was substantially impaired and some weight to the nonstatutory mitigators that Jones suffered from childhood trauma and was loved by his family (*Id.*).

B. THE INITIAL POSTCONVICTION PROCEEDINGS

Based on the evidence presented at Jones' evidentiary hearing, this Court found that trial counsel's performance in relation to the penalty phase was deficient. *Jones*, 998 So. 2d at 582. However, in reviewing the case, post-*Ring*, this Court did not find that the evidence presented in postconviction established prejudice. *Id.* The evidence Jones presented included the following: As children, Jones and his cousins helped their family pick cotton and beans in South Carolina, where he was born. Others observed Jones as a quiet and respectful child. Jones' father was a violent alcoholic who beat his mother regularly. As a young child, Jones often tried to intervene on his mother's behalf, to no avail. Jones' father was in and out of prison. The family ultimately moved to Miami where Jones' father's violence became more vicious and frequent. The family would often flee the house to avoid being abused. And, though

they called the police on more than one occasion, nothing ever changed. Despite, his father's violence, Jones' was very attached to him. When Jones was five, his father permanently abandoned the family.

The cultural difference between South Carolina and Miami was overwhelming for Jones and his family. The other children teased the kids about their accents. When Jones' father left, the family was "very, very poor". Their mother was uneducated with no work skills. The children did without clothing and food and suffered traumatically.

Several years later, Jones' mother married his alcoholic step-father and his mother became an alcoholic. Jones' step-father was a heavy drinker and verbally and physically abusive to his step-son. Likewise, Jones' mother and step-father were often violent with each other around their children. Often their fights would lead to them both being taken to jail – leaving the children on their own to clean up the bloody mess that was left. One night, Jones' parents' violence culminated in his mother's stabbing his step-father to death. When the police arrested Jones' mother, the kids were left all alone in the house after witnessing such a traumatic scene.

Jones' mother's incarceration was "very emotional" for him. Jones visited his mother in prison and the effect was obvious – "[E]verytime we would go there he would – you know – you could see the action in his face, and the moods, the mood swing he would be in ...". Jones felt like he had lost all of his parents.

The Jones children were teased and taunted by their peers about their mother being in prison and being "crazy".

And once his mother had been taken from her children no one from social services stepped in to provide any aid. There was little financial assistance for the family. Jones' friend, Kay Underwood, believed that this was the point when Jones' problems began. Jones loved his mother very much and it was difficult, to say the least, when she was incarcerated.

Though Jones was a "fabulous football player", "a leader" and was respectful to his teammates and coaches, his talent could not spare him from his troubled home life. Indeed, Jones' football coach, Dr. Joseph Accurso testified that Jones was a kid he "loved to have babysit for his [Accurso's] kids." But, the traumatic events of his past soon took their toll on Jones.

Jones married his wife Bertha and was well-mannered and stayed out of trouble in the early part of their marriage. Jones also had a daughter and was a good father to her.

Jones' traumatic childhood took its toll on his mental make-up. As this Court found, "[a]t the evidentiary hearing Jones established the existence of mental mitigation evidence." In 1991, Dr. Robert Berland met with Jones and conducted some testing. Jones' test score indicated a "chronic psychotic disturbance". Though Berland did not testify at Jones' capital trial proceedings, he explained at the postconviction evidentiary hearing that a psychotic disturbance is defined by three main symptoms: hallucination, delusion and biologically based mood disturbance. Jones also exhibited a test profile associated with

drug abusers. Berland opined that Jones' psychosis was likely influenced by a character disorder and biological mental illness.

After conducting a more thorough examination of Jones in 2003, Berland testified that Jones met the criteria of the extreme mental or emotional disturbance statutory mitigating factor. Berland's opinion was based on his diagnosis of Jones with a major mental illness. Berland's diagnosis was substantiated by collateral information, i.e., test scores and witness interviews.

Berland also testified that the statutory mitigating factor that Jones ability to conform his conduct to the law was substantially impaired at the time of the crime. This was based on Jones' biological mental illness which resulted in involuntary choices, behavior and judgment. And, Jones was under the influence of alcohol and cocaine at the time of the alleged offense.[4] Jones' intoxication would have aggravated the underlying mental illness.

Berland's evaluation revealed a history of alcoholism by Jones, starting at age 12 or 13, and crack cocaine abuse, at least 6 months prior to the alleged offense. Finally, Berland diagnosed Jones with brain impairment based on previous testing.

Berland also emphasized the effect of the extreme violence and traumatic experiences that Jones suffered as a child. However, despite Jones' mental health issues, Berland noted that

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[4]Jones blood alcohol level measured .263 with traces of cocaine being apparent, shortly after he was seen with the victim.

Jones had done well in structured environments – like prison, where he did well with work assignments.

C. THE SUPPLEMENTAL POSTCONVICTION PROCEEDINGS

Jones' supplemental Rule 3.851 motions were based upon the newly discovered evidence that the State violated Jones' right to due process in dealing with Prim and that Prim's testimony at Jones' trial was false. Specifically, a man named Alfred Jones revealed that:

> . . . he knew Kevin Prim. Further, Alfred [Jones] disclosed that he had conversations with Prim about Prim's involvement in Mr. Jones' case. These conversations occurred both before and after Mr. Jones' trial.
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> 9. Alfred Jones, knew Kevin Prim by his street name, "Silk." In 1991, Alfred spoke with Prim who stated that he had just been released from jail. When Alfred asked Prim how he had been released, Prim stated "I did what I had to do." Prim went on to state that he had lied about a person confessing to him and that he felt bad about doing it.
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> 10. Alfred further stated that he later heard on the streets that Prim was testifying in a murder case, Subsequent to hearing this, Alfred spoke to Prim. Prim told Alfred that he did not want to testify, that he felt bad about it, and that he had only made up the confession in order to get out of jail.
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> 11. Still later, Alfred talked to Prim after he testified against Mr. Jones. During this conversation, when asked by Alfred why he would give false testimony, Prim stated that he had committed to it and felt like he had to go through with it.

(2PC-R. 13-4).

SUMMARY OF ARGUMENT

1. Jones' sentence of death violates the fifth, sixth, eighth and fourteenth amendments as the jury's sense of responsibility at the penalty phase was inaccurately diminished in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

2. This Court in 2009 heard Jones' prior collateral appeal which presented challenges to his death sentence on the basis newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (1991). Employing the proper standard of the newly discovered evidence analysis requires a determination as to the likelihood that Jones will receive a less severe sentence if 3.851 relief is granted. In making that determination, all of the favorable or exculpatory evidence presented during all collateral proceedings that would be admissible at a new proceeding (a retrial or a resentencing) is to be considered cumulatively with the newly discovered evidence. When all of the evidence that would be admissible if 3.851 relief issues in Jones' case is considered along with the fact that the 1992 death recommendation was not unanimous, it is clear that it is likely that at least one juror would not vote in favor of a death sentence and Jones would receive a less severe sentence.

ARGUMENT

ARGUMENT I

MR. JONES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS THE JURY'S SENSE OF RESPONSIBILITY AT THE PENALTY PHASE WAS INACCURATELY DIMINISHED IN VIOLATION OF *CALDWELL v. MISSISSIPPI*, 472 U.S. 320 (1985).

Throughout Jones' capital trial the jury was repeatedly told they were simply recommending an advisory sentence to the trial judge. *See* T. 13-199 (voir dire); T. 977-88 (State's closing argument at the penalty phase); 948-9 and 996-1001 (jury instructions). In fact, Jones' jury was told that their advisory recommendation was not binding on the trial judge (T. 10), and as

the jury left the courtroom to deliberate about whether or not to recommend that Jones be sentenced to death, they were instructed that the final decision on the sentence rested with the trial judge (T. 948). It should also be noted that the instructions provided prior to deliberating, did not inform the jury that their recommendation was entitled to great weight (T. 996-7).[5]

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[5]In *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), this Court held that the jury's recommendation "should be given great weight.". However, though *Tedder* had been the law for over fifteen years when Mr. Jones' penalty phase occurred, the final jury instructions provided by the trial court failed to impart this critical instruction to the jury.

In 2009, this Court recognized the need for amending the standard jury instructions, adding both the "great weight" language as well as the directive that the jury is "neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *See Henyard v. State*, 689 So. 2d 239, 249-50 (Fla. 1996). This Court explained:

> As to the weighing function, we have authorized the proposed amendments for publication and use. First, in the initial portion of the instruction, we have authorized an amendment stating that the jury recommendation must be given great weight and deference. This proposal is consistent with the Court's case law in this area. *See Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) ("A jury recommendation under our trifurcated death penalty statute should be given great weight."). While we agree with this proposal, we have included a directive to caution judges that this "great weight" instruction should be given only in cases where mitigation was in fact presented to the jury. *See Muhammad v. State*, 782 So.2d 343, 361-62 (Fla.2001) ("We do find ... that the trial court erred when it gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence.").
>
> And second, in the latter portion of the instruction, we have authorized an amendment stating that the jury is "neither compelled nor required to recommend death," even where the aggravating circumstances outweigh the mitigating circumstances. This amendment is consistent with our state and federal case law in this area. *See Cox v. State*, 819

At the time of Jones 1992 trial, what the jury was told may have been consistent with the procedure set forth in Florida law at that time. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988). But, it was clearly inaccurate and unconstitutional. This is

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> So.2d 705, 717 (Fla.2002) ("[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors' ") (quoting *Henyard v. State*, 689 So.2d 239, 249-50 (Fla.1996)); *see also Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality) (explaining that a jury can constitutionally dispense mercy in cases deserving of the death penalty). We note that this amended language is less stringent than the proposal, which provides: "Regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death."
>
> **These amendments are intended to address the ABA's finding that a substantial percentage of Florida's capital jurors (over thirty-six percent of those interviewed) believed that they were required to recommend death if they found the defendant's conduct to be "heinous, vile or depraved,"** or (over twenty-five percent of those interviewed) if they found the defendant to be "a future danger to society." ABA Report at vi. The ABA report also concludes as follows: Approximately forty-eight percent of capital jurors believed that mitigating circumstances had to be proved beyond a reasonable doubt, thirty-five percent of jurors did not know that any mitigating evidence could be taken into consideration, and fourteen percent of jurors believed that only the enumerated mitigating circumstances could be considered. *Id.* at 304. Because of the critical role that aggravators and mitigators play in the weighing process, these areas of confusion are a cause for concern. **We are hopeful, however, that the re-ordering of these instructions, the definitions of key terms that have been added, and the amended explanatory language, including the discussion of burdens of proof, will assist jurors in understanding their role in the capital sentencing process and will eliminate juror confusion in this area.**

In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2, 22 So. 3d 17, 21-22 (Fla. 2009)(emphasis added).

because it was recognized in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as **bias in favor of death sentences** when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.") (emphasis added).

Indeed in *Caldwell v. Mississippi*, a unanimous jury verdict in favor of a death sentence was vacated because the jury was not correctly instructed as to its sentencing responsibility.[6] *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 328-29. Jurors must feel the weight of their sentencing

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[6]In *Caldwell*, the prosecutor responding to defense counsel's argument had stated in his closing argument to the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id.* at 325. Because the jury's sense of responsibility was improperly diminished by this argument, the Supreme Court held that **the jury's unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341. *Caldwell* explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.

responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence. Part of feeling the weight of a juror's sentencing responsibility is dependent upon knowing of their individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is either not explained or is in fact diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the resulting death sentence cannot stand. *Caldwell*, 472 U.S. at 341.

While *Caldwell* was the law before Jones' death sentence became final, it was ruled to be inapplicable to Florida capital proceedings by this Court. *See Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985). In *Darden*, this Court held that under Florida's sentencing scheme, the jury was not responsible for the sentence and thus *Caldwell* was not applicable to jury instructions in Florida telling the jury that its role was advisory:

> In *Caldwell*, the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to

> appellant review. We do not find such egregious misinformation in the record of this trial, and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge.

Darden is no longer the law. The comments, argument and instructions heard by to Jones' jury refer almost a hundred time to the advisory nature of the jury's sentencing recommendation, and thus clearly and repeatedly diminished the jury's sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the U.S. Constitution. Relief is required.

ARGUMENT II

IF RELIEF HAD ISSUED ON JONES' NEWLY DISCOVERED EVIDENCE CLAIM THAT THIS COURT HEARD IN 2009, IT IS PROBABLE THAT HE WOULD HAVE RECEIVED A LESS SEVERE SENTENCE BECAUSE *MOSLEY V. STATE* WOULD BE CONTROLLING THE OUTCOME. IT IS EXTREMELY UNLIKELY THAT A JURY WOULD UNANIMOUSLY VOTE IN FAVOR OF A DEATH RECOMMENDATION. ACCORDINGLY UNDER *MOSLEY*, 3.851 RELIEF SHOULD NOW BE AVAILABLE. TO COMPORT WITH THE EIGHTH AMENDMENT RULE 3.851 RELIEF MUST ISSUE ON THE CLAIM NOW.

A. Introduction.

On December 22, 2016, this Court held in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), that in any capital sentencing proceedings conducted in Florida after June 24, 2002, the jury had to return a unanimous death recommendation before death could be imposed as a sentence. This ruling requires revisiting Jones' newly discovered evidence claim this Court previously rejected.

Under both "fundamental fairness" and "manifest injustice," revisiting an erroneously decided issue is warranted. The concept of "fundamental fairness" was the basis for collateral relief in *James v. State*, 615 So. 2d 668 (Fla. 1993), when new case law established that an issue raised by Davidson James had been

erroneously decided by this Court. Because James had properly raised the claim and had been wrongly denied relief as later U.S. Supreme Court precedent established, his circumstances constituted a specific demonstration of fundamental unfairness which entitled him to collateral relief.

"Manifest injustice" is an exception to the law of the case doctrine. In *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997), this Court explained:

> This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.

The manifest injustice exception to the law of the case doctrine arises from this Court's inherent equitable power to reconsider and correct a prior erroneous ruling. *See Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016) ("to fail to give Thompson the benefit of Hall, which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine.").

Jones presented a newly discovered evidence claim under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), in prior collateral proceedings. Revisiting the denial of the newly discovered evidence claims is warranted because as explained herein, the analysis of the claim was premised upon the erroneous understanding that at a new trial or penalty phase in the future the vote of six jurors in favor of a life sentence would be necessary to constitute a life recommendation. However, *Mosley v. State* has now established that at a penalty phase conducted post-

2002, a life sentence is mandated if just one juror votes in favor of a life recommendation. Thus under either "fundamental fairness" or "manifest injustice," Jones' newly discovered evidence claims must be revisited so the correct legal analysis can be conducted.

B. The Applicable Analysis of Newly Discovered Evidence Claims.

In his prior Rule 3.851 motion, Jones presented newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Under the *Jones* standard, Jones is entitled to relief if he would probably receive a less severe sentence at a retrial or new penalty phase. Unlike the prejudice analyses of claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington,* 466 U.S. 668 (1984) which look to the effect of the evidence in question on the outcome at the trial or the penalty phase that occurred in the past, the second prong of a newly discovered evidence claim looks forward to what will more likely than not occur at a new trial or resentencing. In *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013), this Court explained that the second prong of the newly discovered evidence "standard focuses on **the likely result that would occur during a new trial** with all admissible evidence at the new trial being relevant to that analysis." (emphasis added).

This forward looking aspect of the analysis was apparent in this Court's decision to grant a new trial in *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). There, this Court repeatedly referenced the analysis as to what would happen at a retrial:

> In light of the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through Hildwin's postconviction proceedings, we conclude that the totality of the evidence is of "such nature that it would probably produce **an acquittal on retrial**" because the newly discovered DNA evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."

Hildwin, 141 So. 3d at 1181, quoting *Jones v. State*, 709 So. 2d 512, 521, 526 (Fla. 1998) (emphasis added).

> Based on the standard set forth in *Jones II*, the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that **could be introduced at a new trial**.

Hildwin, 141 So. 3d at 1184 (emphasis added).

> In conclusion, the postconviction court erred in holding that the results from the DNA testing would be inadmissible **at a retrial**. This evidence cannot be excluded merely because the new scientific evidence is contrary to the scientific evidence that the State relied upon in order to secure a conviction at the original trial. Questions surrounding the materiality of the evidence and the weight to be given such evidence are for the jury.

Hildwin, 141 So. 3d at 1187 (emphasis added).

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that **could be introduced at a new trial**, and conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case."

Hildwin, 141 So. 3d at 1187-88, quoting *Swafford v. State*, 125 So. 3d at 776 (emphasis added).

> The newly discovered evidence, when considered together with all other admissible evidence, must be of such nature that it would probably produce *an acquittal on retrial* . . . .

Hildwin, 141 So. 3d at 1188 (emphasis added).

> The dissent ignores the disputed evidence, does not acknowledge the impact that erroneous scientific evidence would have on the jury, and avoids reviewing any of the evidence discovered after trial—evidence that **would be**

> **admissible at a retrial and must be considered** to obtain a full picture of the case.

Hildwin, 141 So. 3d at 1192 (emphasis added).

In *Melton v. State*, 193 So. 3d 881 (Fla. 2016), this Court affirmed the denial of a newly discovered evidence claim. This Court again noted the forward looking nature of the analysis:

> Having considered Melton's newly discovered evidence and **the evidence that could be introduced at a new trial**, including the evidence introduced in Melton's prior postconviction proceedings, we agree with the circuit court's conclusions that there is **no probability of an acquittal on retrial**.

Melton v. State, 193 So. 3d at 885 (emphasis added).

In *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994), this Court explained:

> Only when it appears that, **on a new trial**, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

(emphasis added).

When a newly discovered evidence claim seeks to vacate a death sentence in a capital case, the question is whether it is probable that a new penalty phase would probably yield a less severe sentence, i.e. a life sentence. *Johnston v. State*, 27 So. 3d 11, 18-19 (Fla. 2010). *See Bolin v. State*, 184 So. 3d 492, 498 (Fla. 2015)("If, as here, the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial."); *Melton v. State*, 193 So. 3d at 886 ("it is improbable that Melton would receive a life sentence"). In circumstances like those presented here when qualifying newly discovered evidence is found, the reviewing court must consider the qualifying newly discovered

evidence along with all of the other favorable evidence presented in prior postconviction proceedings that would be admissible at a resentencing, and determine whether a resentencing would probably result in the imposition of a life sentence.

The issue raised by a newly discovered evidence claim is whether a new trial or a resentencing is warranted. In deciding whether a new trial or resentencing should be ordered, the reviewing court must look to whether the new trial or resentencing if granted would probably produce a different outcome. *Armstrong v. State*, 642 So. 2d at 735 ("Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.").

The standard for measuring a newly discovered evidence claim was adopted in *Jones v. State*, 591 So. 2d at 915, when this Court receded from an earlier stricter standard:

> Upon consideration, however, we have now concluded that the *Hallman* standard is simply too strict. The standard is almost impossible to meet and **runs the risk of thwarting justice in a given case**. Thus, we hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The **same standard would be applicable if the issue were whether a life or a death sentence** should have been imposed.

(emphasis added). This Court's formulation of the standard was prompted by concerns that the older stricter standard risked thwarting justice. The *Jones* standard was designed to facilitate the interests of justice and insure that criminal proceedings produce reliable outcomes. This is in keeping with *Johnson v. Mississippi*, 486 U.S. 578, 586-87 (1988)("A rule that regularly

gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. [Citations] To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily."). Under *Johnson*, relief is warranted when new evidence shows that materially inaccurate evidence was considered by the jury.

In capital cases in which a death sentence has been imposed, there is heightened need for a reliable determination to impose death as a penalty.[7] *Johnson v. Mississippi*, 486 U.S. at 584 ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In fact, this heightened need for reliability when a death sentence is imposed has led this Court to recognize a special category of newly discovered evidence claims.

In utilizing the *Jones* standard in a case in which the defendant seeks relief from a death sentence, the issue before a

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[7]In *Ray v. State*, 755 So. 2d 604 (Fla. 2000), this Court vacated a death sentence because the judge may have imposed the death sentence due to a misapprehension as to whether he was obligated to follow the jury's recommendation. *Id.* at 612 ("It seems clear that the judge would have imposed equal sentences but for his belief that a failure to abide by the jury's recommendation would result in a reversal on appeal. Under these circumstances, the trial court's entry of disparate sentences was error."). Obviously, a death sentence imposed due to a misunderstanding of the law would suggest arbitrariness had infected the decision to impose a death sentence.

reviewing court is the likely outcome of a future proceeding, a new trial or resentencing if one is ordered.

When Jones' newly discovered evidence claim was considered by this Court in 2009, this Court did not consider that at a post-2002 resentencing one single juror voting in favor of a life recommendation precluded the imposition of a death sentence.

C. The Admissible Evidence Shows That A Less Severe Sentence Is Likely At A Resentencing.

In *Swafford v. State*, this Court indicated the evidence to be considered when evaluating whether a different outcome was probable included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So.3d at 775-76. The "**standard focuses on the likely result that would occur during a new trial** with all admissible evidence at the new trial being relevant to that analysis." *Id* (emphasis added).

Since Jones' trial in 1992, he has presented evidence that Prim's testimony about Jones' inculpatory statement was false as well as his testimony about the benefits he received in exchange for his testimony against Jones. *See* 2PC-R. 13-4, 66-7. Prim's testimony was relied on by the State to establish the heinous, atrocious and cruel aggravating factor (R. 828-37), and was used in this Court's harmless error analysis on direct appeal to deny relief. *Jones v. State*, 628 So. 2d 669, 678 (Fla. 1995).

Further, at Jones' penalty phase, the jury was instructed to consider five aggravating circumstances (T. 977-9), though the trial court found only three had been established (R. 828-37).

Indeed, the jury was instructed to consider whether the murder was committed in a cold, calculated and premeditated manner, yet according to the trial court, this aggravating circumstance did not exist (*Id.*).

And, importantly, a plethora of mitigating evidence was not presented to Jones' jury due to trial counsel's deficient performance, including mental health mitigation. *Jones*, 998 So. 2d at 582. Though this Court found that the mitigation was not sufficiently prejudicial to satisfy the *Strickland* standard, at a future resentencing, this mitigating evidence would be admissible.

Likewise, the evidence concerning Prim and Watson's benefits that was not sufficient to establish a due process violation would also be admissible to impeach Prim and Watson at a future resentencing.

When all of the errors and evidence are considered cumulatively, along with the fact that even in 1992 the jury did not return a unanimous death recommendation, it is extremely likely that a less severe sentence would have resulted and/or will result at resentencing governed by the post-2002 law set forth in *Mosley*.

D. Conclusion.

When the proper newly discovered evidence analysis is conducted in light of the post-2002 law established in *Mosley v. State*, it is clear that a less severe sentence would have resulted at a post-2002 resentencing or will result at a future resentencing. Thus, it is clear that Jones' death sentence is

unreliable and stands in violation of the Eighth Amendment. Under "fundamental fairness" and/or under the "manifest injustice" exception to the law of the case doctrine, Rule 3.851 relief must issue.

CONCLUSION

In light of the foregoing arguments, Mr. Jones requests that this Court grant him a new penalty phase that complies with the Florida and U.S. Constitutions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 6th day of April, 2018.

CERTIFICATE OF FONT

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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