IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1385

LOWER COURT CASE NO. 91-CF-1932

HARRY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

The State first argues that Argument I of Mr. Jones' Initial Brief is not preserved: "The *Caldwell* claim was not raised below and therefore, is not properly preserved." (AB at 5; *see also*, AB at 3, 6). However, in his Rule 3.851 motion, Mr. Jones argued that his death sentence violated *Caldwell v. Mississippi*, (4PC-R. 51)("After *Hurst v. Florida*, the jury's penalty phase verdict is not advisory. The jury does bear responsibility for a resulting death sentence. Each juror has the power to exercise mercy and require the imposition of a life sentence. Accordingly, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985)." *See also* 4PC-R. 51-2; 55). Mr. Jones properly presented his argument, making it clear that his death sentence violated *Caldwell*.

Additionally, as to the State's complaints about the adequacy of the 3.851 pleading as to Argument I, the State did not file a response to the 3.851 and insisted at the status hearing that all of the issues had been decided by this Court in relation to Mr. Jones' petition for writ of habeas corpus:

> MS. MILLSAPS: That this court has no jurisdiction. Because, in effect, the Florida Supreme court has ruled. This is law of the case. Maybe jurisdiction isn't quite the right word. But the Florida Supreme court was presented with a *Hurst* claim, and they denied that claim on the merits.

(4PC-R. 125). Due to the State's arguments, when Mr. Jones' counsel attempted to argue that the State was incorrect and that other arguments had been presented that had not been ruled upon

by this Court, the Court hung up the phone while Mr. Jones' counsel was speaking. *See* 4PC-R. 130.

Furthermore, the State's position that the circuit court did not rule on the issue and therefore it is not properly preserved neglects the fact that the State prepared the circuit court's order (4PC-R. 129).[1] The State's position, which became the circuit court's ruling was that only a single *Hurst v. Florida* issue had been raised in Mr. Jones' Rule 3.851 motion and that issue had been rejected by this Court in *Asay* and the denial of Mr. Jones' petition for writ of habeas corpus. Thus, because the State erroneously, and perhaps advertently, misunderstood Mr. Jones' arguments, the State failed to address the arguments before the circuit court in drafting the order adopted by the Court, and to which Mr. Jones had no opportunity to object.

At no time did the State advise Mr. Jones of any concerns that it had. The circuit court did not conduct a proper case

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[1]Mr. Jones again attempted to assert his *Caldwell* argument in his motion for rehearing, stating:

> Implicit in that ruling is the recognition that Mr. Jones' death sentence, which was imposed after an advisory jury by a 10-2 vote recommended a death sentence, does not have the "necessary" heightened level of protection. It lacks the enhanced reliability that juror unanimity provides when jurors know that they each have the power to preclude a death sentence by voting for a life sentence. *See Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985) (diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of the juror voting for a death sentence).

(4PC-R. 103).

management hearing at which Mr. Jones could have clarified his arguments to the extent that they were misunderstood. For the State to wait until the appeal to raise for the first time in an Answer Brief a challenge to whether an argument had been adequately pled qualifies as improper sandbagging. The State should not be allowed to fail to file a responsive pleading as Rule 3.851 requires, and then on appeal argue that Mr. Jones failed to adequately articulate his *Caldwell v. Mississippi* argument. By virtue of its failure to respond to the 3.851 in circuit court, the State waived any and all objections to the adequacy of the 3.851 and the manner in which constitutional claims were pled.

As to the merits, the State argues that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is of no consequence in Mr. Jones' case because the jury heard accurate instructions. *See* AB at 3, 7, 9. To state that the jury was instructed properly because even under the current jury instructions the trial court may still override a jury's determination that death is the appropriate penalty and impose a life sentence, misses the point. *See* AB at 3, 7. The State's argument is pure hyperbole. Rather, in the wake of *Hurst v. Florida* and the resulting new Florida law, a jury's unanimous death recommendation is necessary in order to authorize the imposition of a death sentence. After *Hurst v. Florida*, the jury's penalty phase verdict is not advisory. The jury does bear responsibility for a resulting death sentence. Each juror has the power to exercise mercy and require

the imposition of a life sentence. Accordingly, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In *Hurst v. Florida*, the United States Supreme Court wrote that "[**t]he State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires**." 136 S. Ct. 616, 622 (2016)(emphasis added). This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation.

Mr. Jones' jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In *Pope v. Wainwright*, this Court acknowledged that such comments and instructions relieves the jury's anxiety when faced with the responsibility that the jury was deciding to take a defendant's life. 496 So. 2d 798, 805 (Fla. 1986):

> In the instant case, petitioner argues that repeated reference by the trial judge and prosecutor to the advisory nature of the jury's recommendation overly trivialized the jury's role and encouraged them to recommend death. We cannot agree. We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed. **It would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by the jurors impaneled in a first-degree murder trial. We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the**

> **same degree of responsibility as that borne by a 'true sentencing jury**.' Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility. Certainly the reliability of the jury's recommendation is in no way undermined by such non-misleading and accurate information. Further,, if such information should lead the jury to 'shift its sense of responsibility' to the trial court, the trial court, unlike an appellate court, is well-suited to make the initial determination of the appropriateness of the death sentence.

Id. (citations omitted)(emphasis added). This Court's acknowledgment surely supports Mr. Jones' position in relation to the *Caldwell* error in his case.

Furthermore, contrary to the State's argument, *see* AB at 9-10, Mr. Jones' jury was repeatedly told that their recommendation was merely advisory, without the requirement that they be told that it was entitled to great weight. Indeed, the instructions provided prior to deliberating, did not inform the jury that their recommendation was entitled to great weight (T. 996-7).

Finally, as to the State's argument that Mr. Jones' *Caldwell* claim is foreclosed by this Court's opinions in *Reynolds v. State*, __ So. 3d __ , 2018 WL 1633075 (Apr. 5, 2018), and *Johnston v. State*, 2018 WL 1633043 (Apr. 5, 2018), (AB at 8), Mr. Jones submits that he is entitled to an individualized review of the inaccurate and minimizing comments that his jury repeatedly heard. Indeed, the United States Supreme Court stated the following in *Caldwell*:

> **In this case**, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

Caldwell, 472 U.S. at 341 (emphasis added).

Moreover, this Court's determination that the retroactivity analysis tied to a claim concerning the violation of the sixth amendment can be supplanted when addressing a violation of the eighth amendment is erroneous. At the time of Mr. Jones' capital trial, this Court erroneously determined that *Caldwell* did not apply to Florida. However, clearly that jurisprudence no longer withstands scrutiny.

ARGUMENT II

In its Answer Brief, the State argues that Argument II is procedurally barred by virtue of 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.

(AB at 16; *see also* AB at 3-4, 13.[2] In his Initial Brief, Mr. Jones acknowledged that in Argument II, he was asking this Court to revisit issues previously decided by this Court in 2008 and 2009.[3] Aware of the law of the case doctrine, Mr. Jones argued that this Court's recognized exceptions to the law of the case doctrine applied. Under those exceptions, he argued that revisiting those previously decided issues was warranted. Mr. Jones first relied upon the concept of "fundamental fairness" as outlined in *James v. State*, 615 So. 2d 668 (Fla. 1993). There,

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[2]The State did not file a response to the 3.851 motion below and did not advance this argument in the circuit court.

[3]In 2008, this Court rejected Mr. Jones' argument based on *Ring v. Arizona*, 536 U.S. 584 (2002). *Jones v. State*, 998 So. 2d 573, 589 (Fla. 2008).

new controlling case law established that an issue previously raised by James had been erroneously decided by this Court. Accordingly, this Court found that fundamental fairness required this Court to revisit the matter.

Alternatively, Mr. Jones asserted that the "manifest injustice" exception to the law of the case doctrine applied. 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. *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."); *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997).

Rather than address the decisions on which Mr. Jones had relied, the State argues:

> 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. ... Non-retroactivity is not an exception to the law-of-the-case doctrine

(AB at 15-16).[4]

However, what the State is unwilling to concede is that this Court has clearly held that the "manifest injustice exception" to the law of the case doctrine is a type of retroactivity analysis:

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[4]The Answer Brief does not address the manifest injustice exception, *Thompson v. State* or *State v. Owen*.

> Not only have we determined that *Hall* is retroactive utilizing a *Witt* analysis, *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), but 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. *See State v. Owen*, 696 So.2d 715, 720 (Fla.1997) ("[t]his 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" and that "[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case").

Thompson v. State, 208 So. 3d at 50 (footnotes omitted).

Further, even though the State does not address Mr. Jones' "fundamental fairness" argument, this Court has clearly held that the "fundamental fairness analysis" set forth in *James v. State* is also a recognized type of retroactivity analysis:

> The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt* analysis is that under *James*, a defendant or his lawyer would have had to timely raise the constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument. In this case, we determine that *Mosley* would be entitled to retroactive application of *Hurst* under either approach.

Mosley v. State, 209 So. 3d 1248, 1276 n.13 (Fla. 2016).

To be clear, Mr. Jones' argument is that this Court's decision in 2009 rejecting his newly discovered evidence claim implicitly assumed that it was his burden to show that if a resentencing were ordered he would probably receive a less severe sentence because at least six jurors would vote to return a life sentence. However, this Court has held that at any resentencing

conducted after June 24, 2002, a single juror voting in favor of a life recommendation would preclude the imposition of a death sentence. *Mosley v. State*. Mr. Jones' newly discovered evidence claims, which must be evaluated cumulatively with previously unpresented *Brady* and *Strickland* evidence, must be re-evaluated under the law that would have governed had a resentencing been ordered in 2009. This is because the newly discovered evidence analysis is forward looking, i.e. the likelihood of a different result at a future resentencing if a resentencing is ordered. *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013)

The State refuses to acknowledge the forward looking nature of the newly discovered evidence analysis that this Court has repeatedly employed which requires consideration of the law governing the future resentencing if one were to be ordered. Mr. Jones' argument was not at issue or addressed in the two decisions on which the State relies, i.e. *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Beyond ignoring the case law cited by Mr. Jones and citing two decisions that do not address the issue, the State refuses to engage in any relevant analysis.

Furthermore, though the State purports to address the "merits" of Mr. Jones' claim, the State does not address whether under the proper newly discovered evidence analysis it is probable that Mr. Jones would receive a less severe sentence at a resentencing. Under the standard from *Jones v. State*, 591 So. 2d 911 (Fla. 1991), Mr. Jones is entitled to relief if he would

probably receive a less severe sentence at a new penalty phase. The 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).

The State does not address *Jones v. State*, *Swafford v. State*, *Hildwin v. State*, or any of the other newly discovered evidence decisions that Mr. Jones relied upon in his Initial Brief. Accordingly, Mr. Jones will rely upon the argument set forth in the Initial Brief which employed this Court's controlling case law.

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 in a less severe sentence at a future resentencing.

CONCLUSION

This Court must vacate Mr. Jones' death sentence and remand for a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 4th day of May, 2018.

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