IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-500

BRYAN FREDRICK JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the trial court's summary denial of a 3.851 motion filed on October 20, 2016. Citations to the records on appeal in Mr. Jennings' appeal will be as follows:

"R1 _" -- record on the first direct appeal;

"R2 _" -- record on the second direct appeal;

"R3 _" -- record on the third direct appeal;

"PC-R_" -- record on appeal from denial of first Rule 3.850 motion;

"IA-R _" -- record in interlocutory appeal;

"PC-R2 _" -- record on appeal after remand of first 3.850 motion;

"PC-R3 _" -- record on appeal after the second Rule 3.851;

"PC-R4 _" -- record on appeal after the third Rule 3.851;

"PC-R5 _" -- record on appeal after the fourth Rule 3.851;

"PC-R6 _" -- record on appeal in present appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Mr. Jennings is under a death sentence.[1] The successive Rule 3.851 motion that is the subject of this appeal was filed on October 20, 2016.[2] It presented three claims for relief. Claim I

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[1]Jennings was indicted on May 16, 1979, and charged with first degree murder as to a homicide that had occurred on May 11, 1979, in Brevard County. On June 28, 1979, the State disclosed two jailhouse informants (Clarence Muszynski and Allen Kruger) as witnesses for the State. Even though the same public defender's office that represented Jennings also represented Muszynski and Kruger, the trial judge refused to find the existence of a conflict and required the public defender's office to continue as Jennings' counsel. When the State called Kruger as a witness, Jennings' counsel refused to cross-examine Kruger because of the conflict of interest. After Jennings was convicted and a death sentence imposed, this Court reversed and ordered a new trial because trial counsel was burdened with a conflict. *Jennings v. State*, 413 So. 2d 24 (Fla. 1982).

At his second trial, Jennings was again convicted and again sentenced to death. Ultimately, the conviction was overturned on appeal and a new trial ordered because a statement by Jennings obtained in violation of the Fifth Amendment was introduced into evidence. *Jennings v. State*, 473 So. 2d 204 (Fla. 1985).

Jennings' third trial occurred in March of 1986 in Bay County due to a change of venue. Because Kruger had died, his testimony from the second trial was read to the jury. In addition, the State called Muszynski to testify. He had not been called at either the first or second trials. A confidential pre-sentence report prepared in August of 1979 in the case in which Muszynski had been convicted of first degree murder was not disclosed. As a result, the defense did not know that at the time that he claimed to Jennings had confessed the murder to him, Muszynski stood convicted of first degree murder and the State was seeking a judicial override of a jury's life recommendation and was pursuing perjury charges against Muszynski's wife. The third trial resulted in a conviction, an 11-1 death recommendation, and sentence of death. This Court affirmed in Jennings' third direct appeal. *Jennings v. State*, 512 So. 2d 169 (Fla. 1987).

[2]On October 23, 1989, Jennings sought Rule 3.850 relief. The motion included a *Brady* claim based on an undisclosed taped interview of Judy Slocum, who described Jennings's intoxication

rested on the Sixth Amendment. *See Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the Eighth Amendment and the Florida Constitution. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (a jury's unanimous death recommendation was necessary to authorize a death sentence). Claim III asserted that this Court's

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in the early morning hours of May 11, 1979. Jennings also alleged a *Brady* claim because the State failed to disclose impeachment evidence regarding the letter Muszynski wrote in 1985 after he was contacted about testifying at Jennings's third trial. Jennings pled ineffective assistance of counsel at the 1986 trial. He argued that counsel failed to discover and present evidence in Kruger's court file showing Kruger challenged his own mental competency, saying he had "delusional thought patterns," less than two months before his first statement about Jennings. Jennings also argued counsel failed to investigate and present a wealth of mitigating evidence.

The State conceded a *Brady* violation as to the Slocum tape, but argued that the violation was harmless. The circuit court agreed and summarily denied relief. Jennings appealed. This Court affirmed except as to Jennings' claim that he had not received all the public records he should have received and remanded for disclosure of those records. *Jennings v. State*, 583 So.2d 316, 319 (Fla. 1991).

After conducting an evidentiary hearing, the circuit court denied relief. This Court affirmed on appeal. *Jennings v. State*, 782 So. 2d 853 (Fla. 2001).

On November 29, 2010, Jennings filed a 3.851 motion premised upon *Porter v. McCollum*, 558 U.S. 30 (2009). The circuit court summarily denied, and this Court affirmed on appeal. *Jennings v. State*, 91 So. 3d 132 (Fla. 2012). However, this Court gave Jennings 30 days from this Court's order affirming to file another 3.851 motion setting based upon new evidence.

Within the 30 days given by this Court, Jennings filed a 3.851 motion based upon an affidavit from Muszynski. The circuit court conducted an evidentiary hearing and then denied Jennings' newly discovered claim. This Court affirmed on appeal. *Jennings v. State*, 192 So. 3d 38 (Table), 2015 WL 5093598 (Fla. 2015). Jennings filed a motion for rehearing which this Court denied on January 14, 2016, two days after *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. Jennings filed a motion to recall the mandate which this Court denied on March 29, 2016.

rejection in 2015 of the newly discovered evidence, *Brady/Giglio* and *Strickland* claims had to be revisited because at a resentencing (if one had been ordered in 2015) the jury would be required to return a unanimous death recommendation before a judge was authorized to impose a death sentence.

On December 5 2016, a case management hearing was held before Judge Maxwell,[3] who issued an order denying 3.851 relief on December 27, 2016,[4] without reference to this Court's December 22nd decisions *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016). (PC-R6 491).[5] In the order Judge Maxwell addressed Claim III and stated: "Once again, none of the recent decisions have been held to apply retroactively." (PC-R6 502). On January 18, 2017, Jennings moved for a rehearing and relied on *Mosley v. State*, as having held *Hurst v. State* retroactive. He also noted that Claim III did not seek the retroactive application of *Hurst v. Florida*. The denial of Jennings' newly discovered at issue in Claim III was not final

[3]Judge Maxwell had presided at the evidentiary hearing held in 2012 concerning Jennings' newly discovered evidence claim.

[4]Judge Maxwell's signature is dated December 27, 2016. However, the order was not filed by the clerk until January 3, 2017, when Judge Maxwell was apparently no longer a judge. The clerk's certificate of service shows that the order was mailed to Jennings and his counsel on January 4, 2017 (PC-R6 503).

[5]On December 29, 2016, the State filed a notice of supplemental authority and attached the December 22nd opinion in *Asay v. State*. The State's notice did not include the opinion in *Mosley v. State* which had also issued on December 22, 2016.

until after *Hurst v. Florida* issued (PC-R6 516 n.6).

Meanwhile, Judge Maxwell left the bench. Jennings did not know of Judge Maxwell departure and was not notified that a new judge was assigned.[6] An entry in the "progress docket" of the current record on appeal dated January 18, 2016 is labeled "Event: RSGN" and then for the first time identifies Judge Mahl as presiding (PC-R6 342). The parties were not notified of the judicial reassignment. Jennings became aware of the judicial reassignment when he received a copy of the order denying rehearing which was filed on February 14, 2017, and signed by Judge Jeffrey Mahl (PC-R6 532). With no other recourse, Jennings filed a notice of appeal on March 15, 2017.

After this Court received the record on appeal, it issued an order staying the appeal pending the disposition of *Hitchcock v. State*, Case No. SC17-445. Later, this Court issued an order directing Jennings to show cause why the trial court's denial of the 3.851 motion should not be affirmed in light of the decision in *Hitchcock v. State*.

After Jennings filed a response to the show cause order and a reply to the State's reply, this Court on January 25, 2018, issued an order "direct[ing] further briefing on the non-*Hurst*

[6]It is worth noting that the State filed a response to the motion for rehearing on January 24, 2017, and served Judge Maxwell with its pleading (PC-R6 530).

issues."[7]

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.

SUMMARY OF THE ARGUMENTS

1. It violated recognized due process principles and the Eighth Amendment for a motion for rehearing in a 3.851 proceeding to be reassigned to and heard by a different judge without notice to the parties.

2. This Court in 2015 heard Jennings' prior collateral appeals which present 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 Jennings 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 Jennings' case is considered

[7]This order provided that the initial brief on the merits is "not to exceed twenty-five pages."

along with the fact that the 1986 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 Jennings would receive a less severe sentence.

3. In addition, the newly discovered evidence developed in collateral proceedings demonstrate that materially inaccurate evidence was presented to Jennings' jury and used by the State to argue that he should be sentenced to death. The jury's consideration of materially inaccurate evidence does not comport with the Eighth Amendment.

ARGUMENT

ARGUMENT I

JENNNING' RIGHT TO DUE PROCESS WAS VIOLATED WHEN, WITHOUT NOTICE, A NEW JUDGE WAS ASSIGNED AND HEAR HIS MOTION FOR REHEARING.

On January 4, 2017, the clerk of the circuit court served on Jennings and his counsel an order denying his pending 3.851 motion. The order was signed by Judge Maxwell on December 27, 2017.

On January 18, 2017, Jennings filed a motion for rehearing. He noted that he had asked Judge Maxwell at the December 5 case management to hold the matter in abeyance until this Court addressed the retroactivity of *Hurst v. Florida*. The request was made to allow the parties to address whatever the ruling was and then brief and argue how it applied to the claims that Jennings

had raised.

However, Judge Maxwell had refused to wait for this Court's ruling and had refused to give the parties an opportunity to address the import of the rulings, which issued on December 22, 2016. Instead, Judge Maxwell prepared an order denying the Rule 3.851 motion which he signed on December 27, 2016, apparently unaware of the December 22 rulings in *Asay v. State* and *Mosley v. State*. Judge Maxwell's December 27 order made no reference to either *Asay* or *Mosley*. The order was filed by the clerk on January 3, 2017, and served on the parties on January 4. Unbeknownst to Jennings and his counsel, the order was filed and served after Judge Maxwell had left the bench.

Jennings was unaware that Judge Maxwell's refusal to wait for rulings in *Mosley* and *Asay* was due to the fact that he was leaving the bench at the end of 2016, and would no longer be presiding over Jennings' case. When his motion for rehearing was filed on January 18, 2017, Jennings assumed that Judge Maxwell was still the presiding judge. Given that the State's January 24th response to the motion for rehearing shows service on Judge Maxwell, it too was unaware of his departure from the bench.

It was not until Jennings and his counsel received the February 14th order denying a rehearing, that any notice was provided that a new judge had been assigned and was presiding over the 3.851 proceedings. Jennings was not given notice and an

opportunity to determine if he had a basis to disqualify the new judge,[8] or to submit supplemental briefing regarding the history of his case and his claims for relief, or to insure that the judge had been provided the full record, or to orally argue his case.

Judge Mahl's order denying the motion for rehearing was the first and only notice of the judicial reassignment that Jennings received. The order did state:

> The Court has reviewed the Defendant's Successive Motion to Vacate Death Sentence; the State's Response to Defendant's Successive Motion to Vacate Death Sentence, the transcript from the Case Management Conference held on December 5, 2016; the Order Denying Defendant's Successive Motion to Vacate Death Sentence; the Defendant's Motion for Rehearing; the State's Response to Defendant's Motion for Rehearing; and the Official Court file.

(PC-R6 531-32).[9] While this statement was clearly meant to

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[8]Jennings could not have waived any objection to the judicial assignment since he was not given notice it had occurred.

[9]Of course, the record in Jennings' case is particularly voluminous. There were 3 separate trials, 2 lengthy evidentiary hearings in the collateral process, all of which was relevant to Claim III of the 3.851 motion. While the order indicates the Official Court file was reviewed, there is no reference to the trial transcripts, evidentiary hearing transcripts, or Jennings' newly discovered evidence claim that is the heart of Claim III of the 3.851 motion. Judge Maxwell had presided over Jennings' case for years. It is hard to imagine that a new judge could have actually familiarized himself with the trial testimony and the evidentiary hearing testimony as it related to Claim III between January 18, the date of the judicial assignment, and February 14, the date the order issued denying rehearing. The rehearing motion itself had been written with the assumption that Judge Maxwell who presided at the 2012 evidentiary hearing was still presiding.

satisfy Rule 3.231, it did not provide Jennings with timely notice of the judicial reassignment as required by due process, nor did it recognize that under the Eighth Amendment capital cases required extra care. *See 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."); *see also* Fla. R. Jud. Admin. 2.215(b)(10).

Without notice of the judicial reassignment, Jennings was not given an opportunity 1) to determine if he had a basis to disqualify the new judge,[10] 2) to ascertain if the judicial assignment comported with Rule 2.215(b)(10), 3) to submit supplemental briefing regarding the history of his case and Jennings' claims for relief specifically written for a judge who was new to the case and had not presided at the 2012 evidentiary hearing, 4) to insure that the judge had been provided the full record (particularly important to Claim III was the testimony and

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It would have been written differently if it had been known that it was be heard by a new judge with no familiarity with the case.

[10]There was no opportunity to investigate whether in the 35 year history of the case, Judge Mahl had some connection with the case or a witness in the case, or had been given information in the case that would warrant a motion to disqualify. This Court has held that counsel must promptly investigate any basis for a motion to disqualify the presiding judge. *See Lightbourne v. Dugger*, 549 So. 2d 1364, 1366 (Fla. 1989).

evidence presented before Judge Maxwell in 2012 on Jennings' newly discovered evidence claim), nor 4) to orally argue his case to the presiding judge as guaranteed by *Huff v. State*, 622 So. 2d 982 (Fla. 1993). Instead, all that was left for Jennings to do was file a notice of appeal and challenge a judicial reassignment without notice and an opportunity to be heard as violative of due process and the Eighth Amendment in the appeal to this Court.

This Court has recognized that a newly assigned judge who did not preside at the penalty phase of a capital case cannot rely on the jury's death recommendation and conduct the sentencing. *Corbett v. State*, 602 So. 2d 1240, 1244 (Fla. 1992) ("We conclude that fairness in this difficult area of death penalty proceedings dictates that the judge imposing the sentence should be the same judge who presided over the penalty phase."); *Craig v. State*, 620 So. 2d 174, 176 (Fla. 1993) ("Because a substitute judge resentenced him, however, we have no choice but to vacate the death sentences again and direct that a complete, new sentencing proceeding be conducted before a jury.").

Jennings recognizes that here the issues arises not in the context of a sentencing, but in the context of a denial of a motion for rehearing of an order issued by another judge. Nevertheless, *Corbett* and *Craig* demonstrate that the Eighth Amendment requires extra care in capital cases.

It should also be pointed out that in *Corbett* and *Craig*, the

defendant was given notice that a new judge was presiding. Those defendants were given an opportunity to be heard regarding the procedure to be followed when a new judge is assigned in the middle of a case. Jennings was not given notice hear as due process requires.

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process **must be given a meaningful opportunity to be heard. * * ***
>
> *** * *** [A] State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.

Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971) (emphasis added). *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."); *Crump v. State*, 654 So. 2d 545, 547 (Fla. 1995) ("While all judicial proceedings require fair and deliberate consideration ... , this is particularly important in a capital case because, as we have said, death is different.").

In *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990), this Court explained that "[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Due process is equally applicable in collateral proceedings. In *Huff v. State*, 622 So. 2d at 983, this Court held:

> We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard. **Because of the severity of punishment at issue in a death penalty postconviction case**, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion.

(Emphasis added). In *Huff*, this Court then addressed the State's argument that the due process violation was harmless:

> The State further argues that Huff has only addressed the procedural improprieties and has not presented any specific objections to the contents of the order and thus has not demonstrated that reversal on this issue would serve any purpose. In effect, the State seems to argue that Huff's claim puts form over substance. We do not agree. **When a procedural error reaches the level of a due process violation, it becomes a matter of substance.**

Id. at 984 (emphasis added). Thus, the error cannot be found to be harmless.

In Rule 3.851 proceedings, the presiding judge is required to review the entire record. Frequently, the parties spend considerable effort to make sure that the complete record is before the presiding judge. Here, the legal landscape regarding the issues raised in the 3.851 motion and the arguments that the parties had made at the December 5 case management were completely upended by the December 22 decisions in *Asay* and *Mosley*. Jennings sought to explain this in the motion for rehearing which he assumed would be considered by Judge Maxwell who had presiding over Jennings' case for many years and had heard Jennings' prior 3.851 motions. Had counsel known that a new

judge had been assigned, he would have sought to schedule a status to ensure that the new judge had the requisite capital training and had been provided the complete record.[11]

It was particularly important to know that a new judge was presiding as it related to Claim III which dealt with Jennings' newly discovered evidence claim. It required familiarity with the evidentiary hearing in 2012 that Judge Maxwell had presided over.

The assignment of a new judge to hear the motion for rehearing without notice to Jennings or his counsel violated his rights under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment. It constitutes substantive or structural error as this Court explained in *Huff v. State*.

ARGUMENT II

IF RELIEF HAD ISSUED ON JENNINGS' NEWLY DISCOVERED EVIDENCE CLAIMS THAT THIS COURT HEARD IN 2015, 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*

[11]The was particularly important in light of the arguments made in the motion for rehearing regarding the recognition in *Mosley v. State* of the fundamental fairness approach to retroactivity, as well as the manifest injustice exception to the law of the case doctrine identified in *Thompson v. State*, 208 So. 3d 49, 50 (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 Jennings' newly discovered evidence claims this Court previously rejected.[12]

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 US Supreme Court precedent established, his circumstances constituted a specific demonstration of fundamental unfairness which entitled him to collateral relief.

Here, Jennings presented his newly discovered evidence claim to this Court arguing there would probably be a less severe sentence at a resentencing. This Court rejected Jennings argument in late 2015. Jennings filed a motion for rehearing that was not denied until two days after *Hurst v. Florida* issued. Jennings

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[12]This Court heard Jennings' appeal of the denial of his newly discovered evidence claim in 2015. *Jennings v. State*, 192 So. 3d 38 (Table), 2015 WL 5093598 (Fla. 2015). Jennings filed a motion for rehearing which this Court denied on January 14, 2016, two days after *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. Thus, it was the law when this Court affirmance of the denial of the newly discovered evidence claim became final.

filed a motion to recall the mandate bring it to this Court's attention that a major shift in the law occurred before the denial of Jennings' appeal was final.[13] Under *James*, it is fundamental unfair for this Court to not recognize the impact of the change in law on Jennings' newly discovered evidence claim.

"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.").

Jennings presented newly discovered evidence claim under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), in a prior collateral

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[13]This Court rejected Jennings' Sixth Amendment challenge to his death sentence as meritless. It also rejected Jennings' argument that the failure to require a death recommendation to be returned by a unanimous jury rendered his death sentence unconstitutional. *See* IB, Case No. 68,835, page 99. *See Jennings v. State*, 512 So. 2d at 176.

proceeding. 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 established that at a penalty phase conducted post-2002, a death sentence could not be imposed if just one juror votes in favor of a life recommendation. For a death sentence to result, a unanimous death recommendation must be returned by the jury. Here it is probable that a less severe sentence would result at a resentencing.

Under either "fundamental fairness" or "manifest injustice," Jennings' newly discovered evidence claims should 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, Jennings presented newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Under the *Jones* standard, Jennings 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 proper forward-looking analysis:

> 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 to be answered is whether it is probable that a new penalty phase would 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 the resentencing, and determine whether the resentencing would probably result in the imposition of a life sentence.

The issue raised by a newly discovered evidence claim is whether to grant a new trial or a resentencing. To decide 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."). When a resentencing is sought on a newly discovered evidence claim, the court looks to see whether it is likely that the outcome of a resentencing would produce a less severe sentence, i.e. here, a life sentence.[14]

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.

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[14]In *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), this Court found a co-defendant's life sentence was newly discovered evidence that required Scott's death sentence to be vacated and a life sentence imposed because the outcome of a direct appeal following a resentencing would result in a sentence reduction and the imposition of a life sentence.

(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. at 586-87 ("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 reliability in the decision to impose death as a penalty.[15] *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

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[15]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.

determination that death is the appropriate punishment' in any capital case."). In fact, this heightened need for reliability in capital cases has led this Court to recognize the importance of newly discovered evidence claims as to the death sentence.

In utilizing the *Jones* standard in a case in which the defendant seeks relief from a death sentence, the issue before a reviewing court is the likely outcome of a future proceeding, a new trial or resentencing if one is ordered.

When Jennings' newly discovered evidence claim was considered by this Court in 2015, this Court did not consider that at a post-2002 resentencing one single juror voting in favor of a life recommendation render any death sentence imposed invalid. *See Johnson v. State*, 205 So. 3d 1285 (Fla. 2016).

C. The Totality of 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).

Jennings' third trial in March 1986. In the 30 years since

that trial, a wealth of favorable evidence that will be admissible at a resentencing has been uncovered and presented in collateral proceedings.

Clarence Muszynski testified at Bryan Jennings's third capital trial as a jailhouse informant and claimed that Jennings had given him a detailed and graphic account of the crime in 1979. When he testified, Muszynski hammed it up and acted out his claim of how Jennings grabbed the victim's ankles "and swung her like a sledgehammer." The sentencing judge relied on Muszynski's testimony when imposing a death sentence (R3. 3461). On the basis of Muszynski's testimony, the judge found two aggravator: 1) heinous, atrocious or cruel (HAC), and 2) cold, calculated and premeditated (CCP). On the basis of Muszynski's testimony as to Jennings' allegedly intact memory and his physical movements at the time of the crime, the State's mental health experts said that statutory mitigation was not present and that Jennings was not appreciably intoxicated or under the influence of LSD on the night of the offense.[16] (R3. 1513, 1571, 1584).

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[16]The defense did try to impeach Muszynski. Joseph Yopp was called to testify regarding Muszynski's efforts in 1981 to recruit him to back up testimony he was intending to give against Donald Robinson, and which he ultimately did give (R3. 1115-16)." Muszynski tried to persuade Yopp "to back up a yarn he thought up" that "Robinson had confessed to him in jail" (R3. 1116). Yopp testified that Muszynski told him "that we could benefit" if Yopp supported Muszynski's story (R3. 1116-17). Muszynski "indicated when we went back that administration would look on us favorably and transfer us to a better institution, and we·could expect help with our cases." (R3. 1117). The undisclosed confidential PSI and

Muszynski's trial testimony was the reason that Jennings claims based on *Brady v. Maryland* and *Strickland v. Washington*. After his death warrant was signed in the fall of 1989, Jennings presented a *Brady* claim premised upon the State's failure to disclose a taped statement taken from Judy Slocum who was at the bar with Jennings in the early morning hours on the day of the homicide. At about 1:00 or 1:15 AM, Slocum took Jennings home to change his pants because he had broken his zipper. He asked Slocum to drive him because he was too "loaded" to drive. After going to his house, Slocum drove him back to the bar, where she stayed until about 2:30 AM. According to the tape, Jennings was "loaded." He was too drunk to drive and "he seemed to have a childish mind" (PC-R2. 310-14). The State conceded a discovery violation as to the Slocum statement. *Jennings v. State*, 583 So.2d 316, 318 (Fla. 1991) ("the State concedes that the State violated the discovery rules by failing to disclose and produce the taped statement of Judy Slocum"). However, the *Brady* violation was found to not warrant 3.850 relief.[17] This result rested on Muszynski's testimony which the State's experts had

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perjury charges against Muszynski's wife certainly provides corroboration for Yopp's testimony.

[17]*See Jennings v. State*, 583 So.2d at 319 ("We agree with the trial court's analysis of the effect the tape would have had on the trial. The trial court properly rejected this claim because there was not a reasonable probability that the tape would have caused a different outcome at the trial.").

found demonstrated that Jennings's was neither intoxicated nor under the influence of the LSD he had taken.

But the newly discovered evidence that would be admissible at a resentencing includes Muszynski's recantation and the confidential PSI report showing that when Muszynski claimed he spoken with Jennings and obtained a confession, the State was seeking a death sentence on Muszynski first degree murder conviction and had filed perjury charges against Muszynski's wife. While the judge found Muszynski's recantation not credible, the previously unavailable document impeached Muszynski's trial testimony that he had nothing to gain when he went to the State claiming Jennings had confessed.[18] At a resentencing, Muszynski's credibility will be destroyed. That will by itself increase the significance of the mitigation presented in 1986.

However, there is much, much more. The Judy Slocum tape will be admissible at a resentencing.[19] The collateral evidence about Jennings extreme intoxication and his repeated, but unsuccessful, efforts to get a ride home due to his condition. Testimony was presented by witnesses who saw Jennings that night that

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[18]At trial, Muszynski explained why he came forward and offered evidence against Jennings: "The whole time he was telling me it was a big joke, nothing but laughing about the whole thing." (R3 681). He then said that what "motivated [him] to come forward" was "[h]is attitude." (R3 681). This testimony has now been revealed to be demonstrably false.

[19]Evidence about questions about Kruger's mental competence and memory problems in 1979 will be admissible.

Muszynski's testimony as to Jennings' physical prowess that night was not consistent with Jennings' out-of-it condition.

The mitigating evidence presented in collateral proceedings which will be admissible at a resentencing includes:

> (1) Annis Music will testify that at 2:30 AM--just hours before the offense--Jennings told her on the phone that he was getting very drunk, his voice sounded slurred and he pleaded with her to give him a ride home. Music saw Jennings between 5 and 6 AM that same night, and he was very wide-eyed" "very intoxicated" and could not walk down the hall of his home without bumping into the walls;
>
> (2) Patrick Clawson, who was with Jennings at a bar on the night of the offense, will that at 2:30 AM, Jennings was "pretty inebriated" and in such a condition that it seemed unlikely he could have committed the crime in the fashion Muszynski claimed;
>
> (3) Catherine Music will testify that Jennings "looked kind of wild looking" that night;
>
> (4) Billy Crisco's deposition testimony will be admitted to show that Jennings said he "couldn't help it" and that the victim was unconscious from the beginning of the offense;
>
> (5) Floyd Canada saw Jennings at 5 a.m. on the morning of the offense and said in an admissible statement that Jennings "staggered etc. pretty bad . . . 1 step forward 2 [steps] backward."

(PC-R. 166, 173-78, 316-20).

Further, the aggravators used to support the death sentence have been undercut. The three aggravators found were: 1) in the course of a felony, 2) HAC and 3) CCP. The federal district court that reviewed Jennings' habeas petition found that the use of the CCP aggravator violated the Ex Post Facto Clause of the US

Constitution. *See Jennings v. Crosby*, 392 F. Supp. 2d 1312 (N.D. Fla. 2005).[20] CCP will not be available as aggravator at a resentencing.

As to HAC, this Court in 2001 found the HAC instruction given to Jennings' jury was unconstitutional. This Court found the error had been preserved in compliance with *James v. State*, 615 So. 2d 668 (Fla. 1993) and was properly before the Court. However, this Court found the error harmless on the basis of the testimony of Clarence Muszynski. *Jennings*, 782 So. 2d at 863. But that testimony is now in tatters. Contrary to his testimony, Muszynski came forward in 1979 with his story that Jennings confessed to him because the State was seeking to have a judge impose a death sentence on Muszynski and it was prosecuting his wife for perjury.

When all of this is considered cumulatively, along with the fact that even in 1986 the jury did not return a unanimous death recommendation, it is very 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*.

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[20]This Court denial of Jennings' ex post facto challenge to the CCP aggravator as meritless has now been shown to be erroneous. *See Jennings v. State*, 512 So. 2d at 176. The application of the CCP aggravator was found by the federal courts to violate the Ex Post Facto Clause of the US Constitution. *Jennings v. McDonough*, 490 F.3d 1230, 1251-53 (11th Cir. 2007). However, habeas relief was not forthcoming because Jennings had not met his burden to show sufficient injurious effect under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

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 Jennings' 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.

ARGUMENT III

JENNINGS' DEATH SENTENCE IS RIDDLED WITH UNRELIABILITY AND STANDS IN VIOLATION OF THE EIGHTH AMENDMENT DEMAND FOR HEIGHTENED RELIABILITY IN CASES IN WHICH A DEATH SENTENCE IS IMPOSED.

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the US Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

> 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. *See Gardner v. Florida*, 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such

> decisions cannot be predicated on mere "caprice" or **on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process.**" *Zant v. Stephens*, 462 U.S. 862, 884-885, 887, n. 24 (1983).

Johnson v. Mississippi, 486 U.S. 584-85 (emphasis added).[21]

Jennings' case is riddled with indicia of unreliability. The jury clearly heard materially inaccurate evidence. In *Mosley,* this Court wrote:

> **In this case**, where the rule announced is of such fundamental importance, **the interests of fairness and "cur [ing] individual injustice**" compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Mosley v. State, 209 So. 3d at 1282 (emphasis added). The importance of the heightened reliability demanded by the Eighth Amendment was recognized in *Mosley* to be of fundamental importance. Heightened reliability in capital cases is a core value of the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972). The circumstances of Jennings' case and the layer upon layer of error carries the stench of unreliability. Materially inaccurate information was clearly before the jury and part of the State's case for a death sentence in violation of *Johnson v. Mississippi*. For Florida's death penalty to remain

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[21]This Court specifically noted this in *Bevel v. State*, 221 So. 2d 1179 ("a reliable penalty phase proceeding requires that 'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'").

constitutional, this Court must work to insure that death sentences are reliable. This Court's duty to insure death sentences are reliable does not end when the direct appeal is over. It does not end when the initial round of collateral litigation concludes. Standards of decency evolve. As science marches forward and better tools emerge for insuring reliability, the evolving standards of decency must keep up. It cannot be acceptable to say if it was reliable enough for 1986, it does not matter that we can see now that it is not in fact reliable. It is offensive to the Eighth Amendment to ignore the stain of unreliability simply because a case is old.

Jennings' unreliable death sentence stands in violation of the Eighth Amendment. This Court must exercise its inherent equitable powers and vacate the death sentence.

CONCLUSION

In light of the foregoing arguments, this Court must vacate Jennings' death sentence and remand for a new penalty phase, and also for reconsideration of his 3.851 motion in compliance with due process and the Eighth Amendment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing response with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record, on this 5th day of April, 2018.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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