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

REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Fla. Bar No. 0754773
McClain & McDermott, P.A.
141 NE 30th Street
Wilton Manors, FL 33334
305.984.8344
martymcclain@comcast.net

COUNSEL FOR APPELLANT

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

REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

The State erroneously describes the Initial Brief that Mr. Jennings filed on April 5, 2018, as "the supplemental brief filed by Appellant." Apparently, the State regards the response to this Court's order to show cause as brief. However under Rule 9.210(a), it is clear that a response to a show cause order is **NOT** a brief. Indeed, Mr. Jennings in his response to the show cause order objected to having to file such a response before being permitted to file an initial brief in this appeal of right.

Ignoring this reality, the State further demonstrates is confusion by indicating that it "will rely upon its prior statement of the facts and procedural history set forth in its initial response to this Court's show cause order filed on November 1, 2017." (AB at 1). However, Rule 9.210(c) does not allow an appellee to omit a statement of the case and the facts from an answer brief by relying on a reply to a response to a show cause order. The rule is quite specific: "The answer brief shall be prepared in the same manner as the initial brief, provided that the statement of the case and of the facts may be omitted, if the corresponding section of the initial brief is deemed satisfactory." Fla. R. App. P 9.210(c).

This Court has precluded capital collateral appellants from raising issues merely by making reference in an initial brief to arguments set forth in pleadings in the record on appeal. *Duest*

v. Dugger, 555 So. 2d 849, 851-52 (Fla. 1990). The failure to actually set forth argument on an issue being raised amounted to a waiver of those issues. Relying on *Duest*, this Court has held that a habeas petitioner was not permitted to incorporate into a habeas petition arguments made in briefs filed in an appeal. *Floyd v. State*, 18 So. 3d 432, 459 (Fla. 2009) ("general references to other pleadings are not sufficient to preserve a challenge in a collateral proceeding."). *See also Barwick v. State*, 88 So. 3d 85, 101 (Fla. 2011).

Where as here, the State does not plead a statement of the case and of the facts, the logic of *Duest* should mean that the State waived any challenge to the Appellant's statement of the case and of the facts as unsatisfactory. Under Rule 9.210c), the omission of a statement of the case from an answer brief means the statement of the case in "the initial brief [wa]s deemed satisfactory."

ARGUMENT IN REPLY

ARGUMENT I

The State in its Answer Brief does not seem to understand Argument I of the Initial Brief. Yes, Mr. Jennings filed a 3.851 motion in circuit court. Yes, he also filed a motion for rehearing after Judge Maxwell signed an order on December 27, 2016 denying the 3.851 motion had not been not filed with the clerk of court until January 3, 2017, after Judge Maxwell was no

longer on the bench. According to the State, just getting to file motions is all that due process guarantees.

The State's Answer Brief makes no reference to *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993) ("We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard."). *Huff* had been featured in Argument I of the Initial Brief; yet, the State chose not to mention it. In *Huff*, this Court found that the appellant's due process right was violated even though he had been able to file a 3.850 motion in circuit court as well as a motion for rehearing when the 3.850 was denied. In fact, Huff's motion for rehearing objected to the denial of due process which he argued on appeal. *Id.* at 984 ("Huff's motion for rehearing, which was denied by the trial court, objected to the flawed procedure rather than to the contents of the order.").

In this regard, Mr. Jennings' circumstances are worse than those in *Huff*. Mr. Jennings had received no notice that Judge Maxwell had left the bench by the time the clerk filed the order that Judge Maxwell signed a week earlier. Because Mr. Jennings had not received notice of this fact, he did not address the validity of order rendered after the Judge Maxwell was no longer a judge. And because Mr. Jennings did not know that a new judge was assigned to his case when his motion for rehearing was filed, he was denied the opportunity to address a successor judge's

authority to rehear a final order entered by another judge or to speak to matters routinely raised when a new judge steps into a case with a long history and a voluminous record.

The State does point out that a case management hearing was conducted on December 5, 2016. In *Huff*, the circuit court had not held such hearing on the 3.850 motion. While that would seem to have provided Mr. Jennings with more of an opportunity to be heard that was given to Huff, Judge Maxwell did not advise Mr. Jennings that he was leaving the bench within 30 days. Yet, this fact pertinent given Mr. Jennings' request that proceedings on the 3.851 motion be stayed while *Asay v. State* and *Lambrix v. State* were pending before this Court.

At the December 5 case management, Mr. Jennings noted that this Court had stayed two executions (Lambrix stayed on February 2 and Asay stayed on March 2) while it considered the effect of decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) (PC-R6 572). He cited to the then recent decision in *Hurst v. State* and the unresolved questions it raised (PC-R6 573). Mr. Jennnings said those circumstances led other circuit courts to hold 3.851 motions in abeyance pending a ruling in *Lambrix v. State*, *Asay v. State*, or another collateral case addressing the retroactivity of *Hurst v. Florida*. This was because the outcome of *Lambrix* and *Asay* was so critical to Mr. Jennings' Claim I.

> I would ask that given the fact that we know that the Florida Supreme Court will have to be addressing the

> retroactivity of *Hurst v. Florida*, I would ask Your Honor to do what other judges in your position have done. *** If the ruling is in my favor, we will have to be back here addressing that. So why not just overlap [sic] until we actually hear from the Florida Supreme Court what they're going to do? Thank you.

(PC-R6 585).

As to Claim III of the 3.851 motion, Mr. Jennings noted that it did not rest on the retroactivity of *Hurst v. Florida* (PC-R6 585) ("I just want to make the point that retroactivity is not involved in Claim Three."). This was because when the the denial of Mr. Jennings' previously presented newly discovered evidence became final, *Hurst v. Florida* had become the governing law. This mattered because the proper analysis of such claim required a court to consider the probability that a less severe sentence would result if a resentencing were ordered.

> It was to be evaluated about the future law because *Hildwin* and *Swafford* are not about retroactiv[ity]. They are about what will happen at a future resentencing. It is not retroactive application. It's forward. It is forward. You are looking in the future. What would happen at a resentencing in the future?

(PC-R6 591).

Mr. Jennings noted how similar his Claim III was in this regard to Jason Walton's pending newly discovered evidence claim. Walton had appealed a circuit court's denial of his newly discovered evidence claim just after *Hurst v. Florida* issued. *Walton v. State*, Case No. SC16-448. He argued that the analysis of the claim had to consider the effect of *Hurst v. Florida* on

the probability of a less severe sentence at a resentencing in one were ordered. When Walton filed his Initial Brief with this Court, he had also asked in a separate motion that this Court relinquish jurisdiction to the circuit court so that he could argue that the effect of *Hurst v. Florida* had to be part of the analysis of the probability of a less severe sentence at a resentencing (PC-R6 583). Mr. Jennings then told Judge Maxwell that this Court had granted Walton's motion to relinquish on September 13, 2016. Given that, the outcome of Claim III was an open question just as it was *Walton*, which was still pending.[1]

During the hearing, was Mr. Jennings' counsel was not told that Judge Maxwell would no longer be on the bench as of January 2, 2017 (exactly 4 weeks from December 5). When the hearing ended, Judge Maxwell said the parties had 10 days to submit any additional pleadings (PC-R6 592).

On December 9, 2016, Mr. Jennings filed a motion asking Judge Maxwell to stay the proceedings. The motion noted:

> Currently, there are a number of collateral appeal pending in the Florida Supreme Court regarding whether *Hurst v. Florida* is retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). A decision is imminent.

---

[1]Judge Maxwell had presided at the evidentiary hearing on the newly discovered evidence claim. Because it was assumed that he would remain the assigned judge foreseeable future, there was no reason to consider whether a successor judge who had not heard the evidence presented in 2013 could re-evaluate the claim in light of the reason in *Corbett v. State*, 602 So. 2d 1240 (Fla. 1992), and *Craig v. State*, 620 So. 2d 174 (Fla. 1993)

(PC-R6 441). Noting the number of stays entered in other 3.851 proceedings, Mr. Jennings asked for a stay "until the Florida Supreme Court has decided whether *Hurst v. Florida* qualifies for retroactive application under *Witt v. State*." (PC-R6 442).

Had Mr. Jennings known that Judge Maxwell was leaving the bench on January 2, he would have relied on that as further justification for a stay, particularly as to Claim III in light of the relinquishment in *Walton v. State* and in light of *Corbett v. State*, 602 So. 2d 1240 (Fla. 1992), and *Craig v. State*, 620 So. 2d 174 (Fla. 1993). *See Berube v. State*, 33 So. 3d 102, 104 (Fla. 2nd DCA 2010) ("It is well-established that, absent the consent of all parties, a successor judge may not base her ruling on evidence heard by her predecessor."), *Beattie v. Beattie*, 536 So.2d 1078, 1079 (Fla. 4th DCA 1988) ("[A] successor judge may not enter an order or judgment based upon evidence heard by the predecessor.").

On December 16, 2016, Judge Maxwell signed an order denying the request for a stay. The clerk filed the order on January 3, 2017 at 10:55 AM (PC-R6 489). The certificate of service attached to the order is also dated January 3, 2017 (PC-R6 490).

On December 22, 2016, this Court issued its opinions in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 so. 3d 1 (Fla. 2016). These decisions meant that *Hurst v. Florida* was retroactive at least to June 24, 2002.

On December 27, 2016, Judge Maxwell signed an order denying the 3.851 motion. However, this order was not filed until 4:44 PM on January 3, 2017 (PC-R6 491). The certificate of service attached to the order is dated January 4, 2017 (PC-R6 503). The order makes no reference to either the *Mosley v. State* or *Asay v. State* decisions. These decision were the governing law by the time the order was signed; yet, it did not mention them.

Because *Mosley* and *Asay* had not been decide until after Mr. Jennings 3.851 motion was filed, until after the case management hearing, and until after the cutoff date for additional filings had passed, Mr. Jennings did not have an opportunity to address their effect until he filed his motion for rehearing. His procedural posture was similar to the one found to violate due process in *Huff v. State*, 622 So. 2d at 984. He, like Huff, was forced to raise a due process concern for the first time in a rehearing motion. The rehearing motion was Mr. Jennings first and only an opportunity to present his claim for relief on the basis of *Mosley v. State*.

A bigger obstacle was the fact that no notice was provided that the order denying the 3.851 motion was rendered after Judge Maxwell had left the bench. Under Rule 3.851(f)(5)(F), an order is rendered when filed with clerk. *See Pettway v. City of Jacksonville*, _ So. 3d _, 2018 WL 1998758 (Fla. 1st DCA April 30, 2018) ("Rendition requires three things: an order that is signed,

written, and filed with the 'clerk of the lower tribunal.' Fla. R. App. P. 9.020(I)."). In *Carr v. Byers*, 578 So. 2d 347 (Fla. 1st DCA 1991), a judge had edited a draft of a judgment dictating the changes to his secretary. A week later with the proposed judgment not signed, the judge died in a plane crash. The proposed judgment was signed by a successor judge. The judgment was found to be invalid since the deceased judge had not signed, "recorded or filed, or publicly announced" the final judgment before his death. *Id.* at 348. *See Silvern v. Silvern*, 252 So. 2d 865, 866 (Fla. 3rd DCA 1971) (the "authority to rule terminates at the time of the expiration of [judge's] authority.").

While here the judge had signed the order, it had not been "recorded or filed, or publicly announced" before the judge left the bench. *Carr v. Byers*, 578 So. 2d at 348. The order was not rendered before Judge Maxwell's judicial authority had ended. His authority to rule had terminated before the final order was rendered. **Mr. Jennings was not given notice that Judge Maxwell's judicial authority had terminated before the final order denying the 3.851 motion was rendered.**

Without notice of Judge Maxwell's departure from the bench effective January 2, Mr. Jennings prepared and filed a motion for rehearing assuming it would be heard by Judge Maxwell. He was not aware of the possibility that the order was a nullity, and thus not in a position to present the matter in the rehearing motion.

Unaware that a successor judge would have to be assigned, the rehearing motion also did not address the limitations on a successor judge's authority to rehear a final order. Mr. Jennings did not know a fact that changed a judge's power to rehear or reconsider another judge's order denying a 3.851 motion. Without notice, Mr. Jennings was deprived of the opportunity to address these issue, which was particularly important as to Claim III given that Judge Maxwell had presided at the 2013 evidentiary hearing on the newly discovered evidence claim.

This Court has held that a successor judge has limited authority to grant a motion for rehearing of a final order entered by his predecessor. *Groover v. Walker*, 88 So. 2d 312, 314 (Fla. 1956) ("A successor judge generally cannot review, modify or reverse, upon the merits, on the same facts, the final orders of his predecessor unless there exists some special circumstances such as mistake or fraud perpetrated on the court."); *Booth v. Booth*, 91 So. 3d 272, 274 (Fla. 1st DCA 2012) ("The record does not contain competent substantial evidence of any special circumstances such that it was permissible for the successor judge to vacate the final order of his predecessor.").[2]

Mr. Jennings did not learn that Judge Maxwell was no longer

[2]To be clear in both *Groover v. Walker* and *Booth v. Booth*, the successor judges were acting on rehearing motions when they exceeded their authority. Accordingly in Mr. Jennings' case, the successor judge lacked the authority to a rehearing motion absent a showing of special circumstances.

presiding and a new judge was assigned until he received the February 14 order denying his motion for rehearing. By then, it was too late to do anything but appeal and argue to his due process claim to this Court. Mr. Jennings was deprived of notice and an opportunity to be heard as to the validity of an order rendered after a judge had left the bench and/or a successor judge's limited power to rehear of another judge's final order.

The State attached the motion for rehearing to the Answer Brief even though it is the record (PC-R6 504). No where does the rehearing motion address the issues arising from the fact that Judge Maxwell left the bench before the order denying relief was rendered. This is because Mr. Jennings did not know about it. Thus, there was opportunity to be heard. Due process was violated. *Huff v. State*. Moreover as explained in *Huff v. State*, a procedural error that reaches the level of a due process violation is not subject to a harmless error analysis.

In any event, Claim III is virtually the same as the issue raised in *Walton v. State*, Case No. SC16-448. This Court did not stay *Walton* pending *Hitchcock v. State* since this issue was not raised or decided in *Hitchcock v. State*. This Court has yet to address it. Neither Judge Maxwell in his order rendered after he left the bench or his successor when summarily denying the motion for rehearing, properly analyzed Claim III.

ARGUMENT II

The Effect of *Mosley v. State* on Florida Law

In *Mosley v. State*, this Court considered whether *Hurst v. Florida* was retroactive, and if so, retroactive to what point in time. This Court noted that *Hurst v. Florida* flowed from *Ring v. Arizona*, 536 U.S. 684 (2002), which had issued on June 24, 2002. Given *Ring*'s importance to *Hurst v. Florida*, this Court said:

> Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, **fairness strongly favors applying *Hurst*, retroactively to that time.** * * *
>
> We now know after *Hurst v. Florida* that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*. From *Hurst*, it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State. Thus, this factor weighs in favor of granting retroactive relief to the point of the issuance of *Ring*.
>
> ***
>
> **Holding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual.**

209 So. 3d at 1280-81 (emphasis added).

Surely, this Court's decision to "hold[] *Hurst* retroactive to when the United States Supreme Court decided *Ring*," means that *Hurst v. Florida* constitutes the governing law in Florida as of June 24, 2002, the day *Ring* was decided.

The State's answer to Argument II is premised upon a

different reading of *Mosley*. The State does not read of *Mosley* as establishing June 24, 2002 as the effective date for *Hurst v. Florida*. Instead, it is seen as creating distinct classes of death sentenced individuals:

> Appellant ignores the fact that the *Mosley* Court foreclosed retroactive relief to capital defendants whose sentences were final before *Ring*.

(AB at 7). Under this reading, from June 24, 2002 until January 12, 2016, two versions of Florida capital law now exist. One version governs in capital collateral proceedings; the another version, which complies with the dictates of *Hurst v. Florida*, governs capital trials, re-trials and/or resentencings conducted since June 24, 2002.

The State's reading of *Mosley* means that when a court must evaluate a newly discovered evidence claim in a 3.851 motion and decide if a less severe sentence would probably result at a resentencing, the court must ignore the law that will govern at the resentencing. The State's view means that while a death sentence final before June 24, 2002 is in place, the analysis of the newly discovered evidence must be conducted without regard to the current capital sentence scheme. The State maintains that the court must in its analysis ignore that if a resentencing is ordered, the current law will preclude a death sentence if one juror votes for a life sentence. This notion defies logic and can only be called arbitrary and/or irrational and violative of the

Eighth and Fourteenth Amendments.

The State hides from defect in its argument by refusing to address this Court's jurisprudence set out in the Initial Brief which requires an analysis of the likely outcome of a future resentencing before a resentencing can be granted.

***James v. State* and the Manifest Injustice Exception**

In his Initial Brief, Mr. Jennings' noted that when the denial of his newly discovered evidence claim became final *Hurst v. Florida* was already the law, but not applied when the claim analyzed. For that reason, he argued the claim had to be revisited under a fundamental fairness analysis and/or the manifest injustice exception to the law of the case doctrine.[3] For the fundamental fairness analysis, Jennings cited *James v. State*, 615 So. 2d 668 (Fla. 1993). For the manifest injustice exception, he cited *Thompson v. State*, 208 So. 3d 49 (Fla. 2016).

The State ignores the fact that in *Mosley v. State* this Court found the fundamental fairness analysis of *James* was an alternative basis for giving Mosley the benefit of *Hurst v.*

---

[3]In complete disregard of Mr. Jennings' arguments in the Answer Brief, the State falsely claims:

> Appellant provides no legal support for his proposition that the postconviction claims he has previously litigated and appealed to finality are entitled to a rehearing and/or reconsideration in light of the *Hurst* decision.

(AB at 12).

Florida. This Court did not limit the applicability of the *James* by time. Indeed, *James* issued in 1993 well before June 24, 2002.

As for the miscarriage of justice exception, the State argues that Mr. Jennings' misread *Thompson*: "the opinion in *Thompson* is premised on the *Witt* factors as well." (AB at 8). While *Thompson* did cite to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and say it provided an alternative basis for applying new case law retroactively, it made clear that the miscarriage of justice exception was a separate, distinct, stand-alone basis for the retroactive application of the new case law:

> [T]o 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, 208 So. 3d at 50 (emphasis added).[4]

To clarify, Jennings is arguing is that because the finality date of this Court's decision rejecting his newly discovered evidence claims was after *Hurst v. Florida* had issued. However, the rejection of the claim implicitly assumed that Jennings had

[4]The State completely ignores *State v. Owen*.

to show that at a future resentencing, he would probably receive a less severe sentence because at least six jurors would vote for a life sentence. But, at any resentencing conducted after June 24, 2002, a single juror voting in favor of a life recommendation precludes the imposition of a death sentence. *Mosley v. State*. The failure to include the effect of *Hurst v. Florida* as part of the newly discovered evidence when *Hurst v. Florida* issued before the denial of the newly discovered evidence claim was final is both fundamentally unfair and a manifest injustice given that is probable that a jury would not unanimously vote for death sentence, meaning a less severe sentence would result.

Swafford **and** ***Hildwin*** **Require a Forward Looking Analysis Which Considers All of the Admissible Evidence, Even Procedurally Barred Evidence**

The State not only fails to acknowledge the forwarding looking nature of the analysis required by *Swafford* and *Hildwin*,[5] it fails to recognize what evidence must be part of the forward looking analysis.

One specific aspect of the forward looking analysis is the requirement that all evidence that will be admissible at the future resentencing must be considered in deciding whether a less

[5]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. Jennings set forth the case law reflecting the forwarding looking nature of the analysis in his Initial Brief (IB at 17-21). The State simply ignores Mr. Jennings' argument in that regard.

severe sentence will probably result.

Under the standard from *Jones v. State*, 591 So. 2d 911 (Fla. 1991), Mr. Jennings 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 noted in *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). There, this Court repeatedly referenced the forward looking nature of the analysis and what evidence was to consider:

> 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).

> [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).

The State fails to understand that all evidence that will be admissible evidence must be part of the analysis. Evidence previously presented in support of an ineffectiveness claim, previously presented in support of a *Brady* claim, or previously presented in support of a newly discovered evidence claim must be considered if it will be admissible at the resentencing. The State contends that evidence previously considered in a collateral proceeding is procedural barred from consideration:

> Attempt to relitigate claims that have previously been raised and rejected are procedurally barred. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Appellant has had his day in court, multiple times. Since Appellant's *Strickland* claims and *Brady* claims have already been litigated, the doctrines of law-of-the-case and collateral estoppel further preclude re-litigation of this issue.

(AB at 11).

The State challenges Mr. Jennings' reading of *Hildwin* and

Swafford: "Neither *Hildwin* or *Swafford* can be read as resurrecting previously denied legal claims." (IB at 9). But in Justice Canady's dissent in *Swafford*, he read the majority opinion as resurrecting procedurally barred claims:

> Reliance on the 2004 test results to overturn Swafford's convictions is a transparent veil the majority casts over its revisiting of discrete issues that previously were adjudicated adversely to Swafford by this Court and that are now—in these proceedings related to Swafford's fourth postconviction motion—procedurally barred.

Swafford, 125 So. 3d at 779 (Canady, J., dissenting).[6]

When the proper newly discovered evidence analysis is conducted in light of the post-2002 law established in *Mosley v. State*,[7] it is clear that a less severe sentence will result at Mr. Jennings' future resentencing.

ARGUMENT III

The State's purported response to Argument III does not actually address Argument III of Mr. Jennings' Initial Brief, an

---

[6]It is also how the majority in *Hildwin* read *Swafford:*

> As this Court held in *Lightbourne*, and more recently in *Swafford*, a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal.

Hildwin, 141 So. 3d at 1184.

[7]The State makes no attempt to address the evidence that will be admissible at a resentencing and whether a less severe sentence is not likely given that a unanimous death recommendation will be necessary for a death sentence to result.

argument premised on *Johnson v. Mississippi*, 486 U.S. 578 (1988). Argument III rests on the following language in *Johnson:*

> 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)).

Johnson v. Mississippi, 486 U.S. 584-85 (emphasis added).[8]

The error in *Johnson* was the fact that "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Johnson*, 486 U.S. at 590. The the death sentence was thus unreliable and violative of the Eighth Amendment. Here, the newly discovered evidence in conjunction with the decision in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016), and the decision in *Mosley v. State*, reveal that Mr. Jennings's death sentence is similarly unreliable and violative of the Eighth Amendment.

CONCLUSION

In light of the foregoing arguments, this Court must vacate the denial of 3.851 relief and/or vacate Mr. Jennings' death sentence and remand for a new penalty phase.

---

[8]Instead of discussing *Johnson v. Mississippi* or the argument based on it, the State discusses whether *Caldwell v. Mississippi*, 472 U.S. 320 (1985), was violated when Mr. Jennings' jury was told that its role was advisory. But, Mr. Jennings' did not make such an argument or cite *Caldwell* in his brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing Reply Brief with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record, on this 16th day of May, 2018.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2)

/s/. Martin J. McClain
MARTIN J. MCCLAIN
Florida Bar No. 0754773
McCLAIN & McDERMOTT, P.A.
Attorneys at Law
141 NE 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@comcast.net

Registry Counsel for Mr. Jennings