IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-896

GROVER B. REED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL 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@earthlink.net

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal from the trial court's summary denial of a 3.851 motion filed on January 12, 2017. Citations to the records on appeal in Mr. Reed's case will be as follows:

"R_" -- record on direct appeal to this Court;

"T_" -- transcript of trial proceedings;

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

"PC-R1_" -- record on appeal following remand;

"PC-R2_" -- record on appeal from the second Rule 3.851;

"SPC-R2_" -- supplemental record on appeal from the second Rule 3.851;

"PC-R3_" -- record on appeal in current appeal.

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STATEMENT OF THE CASE AND FACTS

Mr. Reed is under a death sentence.[1] The successive Rule 3.851 motion that is the subject of this appeal was filed on January 12, 2017.[2] The motion was filed after an earlier motion filed on November 3, 2016, had been denied without prejudice on November 14, 2016, by Judge Mahon, who was the presiding judge on Mr. Reed's case (PC-R3 49). A motion for rehearing was filed, and

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[1]Reed was arrested on April 3, 1986, and indicted on July 10, 1986, in Duval County and charged with first degree murder and armed robbery. The lead prosecutor was George Bateh who made a plea deal with a public defender client to obtain testimony against Reed from a jailhouse informant. On August 6, 1986, Bateh then had the public defender's office removed as Reed's counsel over objections from Reed and the public defender's office. Richard Nichols was then appointed to represent Reed. The capital trial commenced on November 17, 1986, 104 days after Nichols was appointed as counsel. The jailhouse informant that Bateh relied on to remove the public defender's office from the case did not testify at the trial. Guilty verdicts were returned on November 20. Bateh and Nichols stipulated that no testimony would be presented at a penalty phase. After hearing closing arguments, it took the jury 20 minutes to return an 11-1 death recommendation. The judge imposed a death sentence on January 9, 1987. On direct appeal, this Court initially granted Reed a new trial. *Reed v. State*, 14 Fla. L. Weekly S298 (Fla. June 15, 1989). Later, this Court granted the State's motion for rehearing and affirmed while striking 2 of the 6 aggravators that supported the death sentence. *Reed v. State*, 560 So. 2d 203 (Fla. 1990).

[2]On February 28, 1992, Reed filed a 3.850 motion which was summarily denied. On appeal, this Court reversed and remanded for an evidentiary hearing. *Reed v. State*, 640 So. 2d 1094 (Fla. 1994). On remand due to legislative action, Reed was stripped of his longstanding collateral counsel and new registry counsel was appointed. After the trial court denied relief, this Court affirmed the denial on appeal. *Reed v. State*, 875 So. 2d 415 (Fla. 2004).

A successive 3.851 motion was filed in 2010. After it was summarily denied, this Court affirmed on appeal. *Reed v. State*, 116 So. 3d 260(Fla. 2013).

it was denied on December 21, 2016 (PC-R3 68).

Rather than appeal the ruling and because the 3.851 motion had been denied without prejudice, Mr. Reed revised and re-filed the motion in the wake of the December 22, 2016 ruling in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Mr. Reed understood that Judge Mahon was still presiding. There was no notice of a judicial reassignment.

After the January 12, 2017 filing, there was nothing to indicate Mr. Reed's case had been reassigned to Judge Linda McCallum before the receipt of an order summarily denying the 3.851 motion that had been signed by Judge McCallum (PC-R3 167).[3] Mr. Reed's counsel received the order on March 6, 2017 (PC-R3 175).

On March 15, 2017, Mr. Reed filed a motion to disqualify Judge McCallum (PC-R3 173). The motion relied on the fact that she had been a capital prosecutor with the Duval County State Attorney's Office in the late 1980's and early 1990's and had prosecuted capital cases. Judge McCallum was part of the State Attorney's team of capital prosecutors. Each capital prosecutor had input in the decision making in each other's cases. This

[3]Reed filed a motion to exceed the page limits with the 3.851 motion (PC-R3 150). The State filed a response to the motion for excess pages (PC-R3 152). It did not file a response to the 3.851 motion despite the mandatory language in Rule 3.851(f)(3)(B). A case management conference was not conducted despite the mandatory language set forth in Rule 3.851(f)(5)(B).

means she would have been available for involvement in the trial and collateral proceedings in Mr. Reed's case during that time period.

Additionally, Judge McCallum had prosecuted at least one current death row inmate. *See Moore v. State*, 701 So. 2d 545 (Fla. 1997). That death sentence became final before June 24, 2002, and had a non-unanimous death recommendation. Because that death case is in the same procedural posture as Reed's, a ruling in favor of Mr. Reed on his 3.851 motion would have jeopardized the vitality of the death sentence successfully obtained by Judge McCallum and currently still intact.

Due to these circumstances, Mr. Reed's motion for judicial disqualification argued that under *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), his due process rights had been violated and required Judge McCallum's disqualification.

Mr. Reed also filed a motion for rehearing (PC-R3 183).

Judge McCallum signed an order denying the motion to disqualify on March 22, 2017 (PC-R3 194). The order said that the motion was speculative and had failed "to allege any specific instances of prejudice or bias."

On March 27, 2017, Judge McCallum denied Mr. Reed's motion for rehearing (PC-R3 197).

Mr. Reed appealed. 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 Mr. Reed 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 Mr. Reed 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* issues."[4]

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. Judge McCallum erroneously denied Reed's motion to disqualify which was based upon her work in the State Attorney's Office as a capital prosecutor while Reed's trial occurred in collateral litigation occurred, as well as on the impact a ruling on Reed's 3.851 motion would have on the death sentences Judge McCallum had obtained while she was a capital prosecutor.

2. This Court in 2004 and 2013 heard Reed's prior collateral appeals which present challenges to his death sentence on the basis newly discovered evidence under *Jones v. State*, 591

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

So. 2d 911 (1991). Employing the proper standard of the newly discovered evidence analysis requires a determination as to the likelihood that Reed 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) must be considered cumulatively with the newly discovered evidence. When all of the evidence that would be admissible if 3.851 relief issues in Reed's case is considered, it is clear that at least one juror would not vote in favor of a death sentence and Reed 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 Reed's 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

REED'S RIGHT TO DUE PROCESS REQUIRED JUDGE MCCALLUM TO GRANT HIS MOTION FOR JUDICIAL DISQUALIFICATION.

After receiving the order summarily denying Reed's 3.851 motion on March 6, 2017, which for the first time revealed to him

that Judge McCallum was presiding on his case, he promptly prepared and filed a motion for her disqualification. In this motion, Reed stated the facts as he knew them:

> Judge McCallum was employed by the Duval County State Attorney's Office from 1986 until her appointment as a county judge in 1994. During her tenure with the State Attorney's Office, Judge McCallum handled capital prosecutions and was part of the team of capital attorneys. In at least one case during that time, she represented the State at a capital trial and penalty phase that resulted in a death sentence. Thomas Moore, the defendant in that case, is currently still on death row.
>
> Mr. Reed was tried and convicted in late 1986. A death sentence was imposed in January of 1987. Postconviction proceedings involving capital prosecutors from the State Attorney's Office were ongoing in the early 1990's. Throughout this time period Judge McCallum was employed by the State Attorney's Office handling capital prosecutions, and working with the attorneys who prosecuted Mr. Reed and represented the State in collateral proceedings. As part of the capital team during her tenure with the State Attorney's Office, each prosecutor including Judge McCallim had input in the decision making in each other's cases.
>
> * * * While Mr. Reed's motion sought specifically to vacate his death sentence, a finding that he was entitled to collateral relief would mean that in the capital cases that Judge McCallum prosecuted between 1986 and 1994 that resulted in the imposition of a death sentence, relief would likely have to also be granted. A ruling in Mr. Reed's case would impact the death sentences that Judge McCallum successfully sought and which have yet to be carried out.

(PC-R3 174).

Moreover when Judge McCallum issued the order summarily denying Reed's motion for judicial disqualification, the State had not filed a response to the pending 3.851 as required by the

mandatory language set forth in Rule 3.851(f)(3)(B). Further, a case management conference had not been conducted as required by the mandatory language set forth in Rule 3.851(f)(5)(B).[5]

It was in that context that Reed's counsel learned from the order denying the 3.851 motion that Judge McCallum was suddenly the presiding judge and had denied the motion without a response from the State and without a case management conference. Due to counsel's familiarity with Judge McCallum's role in another capital prosecution, counsel investigated Judge McCallum's history with the State Attorney's Office, prepared and then filed the motion to disqualify after consulting with Reed.

In the motion for judicial disqualification, Reed relied upon the recent decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). There, the US Supreme Court stated:

> Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. *See Murchison*, 349 U.S., at 136–137, 75 S.Ct. 623. This objective risk of bias is reflected in the due process maxim that "no man can be

[5]Judge McCallum did not comply with Rule 3.851 (f)(5)(B), which provides: "Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court **shall hold a case management conference**." (Emphasis added). *See Huff v. State*, 622 So. 2d 982 (Fla. 1993). A case management hearing as required by the rule was not conducted. Had a case management hearing been conducted, Reed would have learned of Judge McCallum's assignment to his case and would then have filed a motion to disqualify. Judge McCallum's disregard for the governing procedural rules may be indicative of a desire to protect a death sentence that she had successfully championed when a prosecuting attorney in the early 1990's.

> a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.*, at 136, 75 S.Ct. 623.

136 S. Ct. at 1905-06. The Supreme Court concluded that the Due Process Clause was implicated and required disqualification of a judge who was a prosecutor where his decision making as a judge may be influenced by an inadvertent motion to validate or preserve a prosecutorial result previously obtained:

> Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains **a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process**. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the **duty to withdraw in order to ensure the neutrality of the judicial process** in determining the consequences that his or her own earlier, critical decision may have set in motion.

136 S. Ct. at 1907 (emphasis added).

In her order denying the motion for her disqualification, Judge McCallum found the motion facially and legally deficient:

> Defendant makes speculative, cursory allegations of bias, but fails to allege any specific instances of prejudice or bias of the Court. Moreover, Defendant has not shown an objectively reasonable fear that he will not receive a fair hearing. Thus, Defendant's Motion is legally insufficient.

(PC-R3 195). Judge McCallum did not address Reed's reliance on *Williams v. Pennsylvania*.

In the context of capital collateral proceedings, this Court

has addressed a motion for judicial disqualification and stated:

> Wickham asserts that the postconviction court erred by denying his motion to disqualify all Second Circuit judges from deciding his rule 3.851 motion. In light of the unique and extraordinary circumstances in this case, Wickham's motion to disqualify should have been granted.
>
> Wickham's motion to disqualify is governed substantively by section 38.10, Florida Statutes (2001), and procedurally by Florida Rule of Judicial Administration 2.160 (1992). *See Cave v. State*, 660 So.2d 705, 707 (Fla.1995). "Whether the motion is 'legally sufficient' is a question of law, and the proper standard of review is de novo." *Chamberlain v. State*, 881 So.2d 1087, 1097 (Fla.2004). Under rule 2.160, a motion to disqualify must show "that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge," or **that the judge** or any relative **is interested in the result of the case**, or that the judge is related to counsel, or that the judge is a material witness. "The facts alleged in a motion to disqualify must demonstrate that the party has a well-grounded fear that he will not receive a fair trial before the judge." *Doorbal v. State*, 983 So.2d 464, 476 (Fla.2008).

Wickham v. State, 998 So. 2d 593, 596 (Fla. 2008). This same standard applies even if the pending matter is a successive 3.851 motion. *See Marek v. State*, 14 So. 3d 985 (Fla. 2009).[6] This Court has also stated:

> The ultimate inquiry is "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Id. This

[6]In *Marek*, disqualification was required in under warrant litigation on a successive 3.851 motion where Marek's counsel was told by another attorney that a judge's staff attorney had been seen with an assistant state attorney discussing Marek's case in a courthouse hallway and exchanging papers without counsel for Marek present after the death warrant was signed.

> determination must be based solely on the alleged facts—the presiding judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Fla.R.Crim.P. 3.230(d).

Rogers v. State, 630 So. 2d 513 (Fla. 1993).

Where the judge was previously a prosecutor and her work as a prosecutor may be invalidated by a ruling in the defendant's favor, the defendant's due process rights are implicated. *Williams v. Pennsylvania*. This is a recognition that an individual in Reed's shoes would have a reasonable fear that the presiding judge has an interest in the outcome of the proceedings that is adverse to him.

Reed is not in position to know with any certainty what role Judge McCallum, as a member of the capital team in the Duval County State Attorney's Office, had in his trial or collateral proceedings between 1986 and 1994. But, he understands that the team members were involved in each other's cases. That knowledge gives rise to a reasonable fear under *Rogers*. The circumstances here are virtually identical to those raised in *Cave v. State*, 660 So. 2d 705 (Fla. 1995) (recusal required because the judge had worked in State Attorney's Office at the time of the defendant's original capital trial).

Reed does know that because of the issues he raised in his 3.851 motion and the posture of his case and the posture of the Moore case, Judge McCallum's ruling on his 3.851 motion would either insulate or threaten the death sentence that Judge

McCallum had obtained in the Moore case. That is just clear. Accordingly under *Williams v. Pennsylvania*, Judge McCallum was required to grant Reed's motion for judicial disqualification.

A judge's erroneous failure to grant a motion for judicial disqualification is not subject to harmless error analysis. Such error is structural error. This is apparent from *Williams v. Pennsylvania* where the Supreme Court held:

> The Court has little trouble concluding that **a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review**, regardless of whether the judge's vote was dispositive.

136 S. Ct. at 1909 (emphasis added). At stake is the integrity of the judiciary, as well as Reed's rights under the Due Process Clause. The matter must be reversed and remanded for compliance with basic bedrock due process.

ARGUMENT II

IF RELIEF HAD ISSUED ON REED'S NEWLY DISCOVERED EVIDENCE CLAIMS THAT THIS COURT HEARD IN 2004 AND 2013, IT IS PROBABLE THAT HE WOULD HAVE RECEIVED A LESS SEVERE SENTENCE BECAUSE *MOSLEY V. STATE* WOULD BE CONTROLLING THE OUTCOME. IT IS EXTREMELY UNLIKELY THAT A JURY WOULD UNANIMOUSLY VOTE IN FAVOR OF A DEATH RECOMMENDATION. ACCORDINGLY UNDER *MOSLEY*, 3.851 RELIEF SHOULD NOW BE AVAILABLE. TO COMPORT WITH THE EIGHTH AMENDMENT RULE 3.851 RELIEF MUST ISSUE ON THE CLAIM NOW.

A. Introduction.

On December 22, 2016, this Court held in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), that in any capital sentencing

proceedings conducted in Florida after June 24, 2002, the jury had to return a unanimous death recommendation before death could be imposed as a sentence. This ruling requires revisiting Reed's newly discovered evidence claims this Court previously rejected.

Under both "fundamental fairness" and "manifest injustice," revisiting an erroneously decided issue is warranted. The concept of "fundamental fairness" was the basis for collateral relief in *James v. State*, 615 So. 2d 668 (Fla. 1993), when new case law established that an issue raised by Davidson James had been erroneously decided by this Court. Because James had properly raised the claim and had been wrongly denied relief as later US Supreme Court precedent established, his circumstances constituted a specific demonstration of fundamental unfairness which entitled him to collateral relief.

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

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

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

of Hall, which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine.").

Reed presented newly discovered evidence claims under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), in prior collateral proceedings. Revisiting the denial of the newly discovered evidence claims is warranted because as explained herein, the analysis of the claim was premised upon the erroneous understanding that at a new trial or penalty phase in the future the vote of six jurors in favor of a life sentence would be necessary to constitute a life recommendation. However, *Mosley v. State* has now established that at a penalty phase conducted post-2002, a life sentence is mandated if just one juror votes in favor of a life recommendation. Thus under either "fundamental fairness" or "manifest injustice," Reed's newly discovered evidence claims must be revisited so the correct legal analysis can be conducted.

B. The Applicable Analysis of Newly Discovered Evidence Claims.

In his prior Rule 3.851 motions, Reed presented newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Under the *Jones* standard, Reed is entitled to relief if he would probably receive a less severe sentence at a retrial or new penalty phase. Unlike the prejudice analyses of claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v.*

Washington, 466 U.S. 668 (1984) which look to the effect of the evidence in question on the outcome at the trial or the penalty phase that occurred in the past, the second prong of a newly discovered evidence claim looks forward to what will more likely than not occur at a new trial or resentencing. In *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013), this Court explained that the second prong of the newly discovered evidence "standard focuses on **the likely result that would occur during a new trial** with all admissible evidence at the new trial being relevant to that analysis." (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

> The dissent ignores the disputed evidence, does not acknowledge the impact that erroneous scientific evidence would have on the jury, and avoids reviewing any of the evidence discovered after trial—evidence that **would be admissible at a retrial and must be considered** to obtain a full picture of the case.

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

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

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

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

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

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

(emphasis added).

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

resentencing, and determine whether a resentencing would probably result in the imposition of a life sentence.

The issue raised by a newly discovered evidence claim is whether a new trial or a resentencing is warranted. In deciding whether a new trial or resentencing should be ordered, the reviewing court must look to whether the new trial or resentencing if granted would probably produce a different outcome. *Armstrong v. State*, 642 So. 2d at 735 ("Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted."). 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.[7]

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

[7]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.

> would probably produce an acquittal on retrial. The **same standard would be applicable if the issue were whether a life or a death sentence** should have been imposed.

(emphasis added). This Court's formulation of the standard was prompted by concerns that the older stricter standard risked thwarting justice. The *Jones* standard was designed to facilitate the interests of justice and insure that criminal proceedings produce reliable outcomes. This is in keeping with *Johnson v. Mississippi*, 486 U.S. 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 a reliable determination to impose death as a penalty.[8] *Johnson v. Mississippi*, 486 U.S. at 584

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[8]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.

("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In fact, this heightened need for reliability when a death sentence is imposed has led this Court to recognize a special category of newly discovered evidence claims.

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

When Reed's newly discovered evidence claim was considered by this Court in 2004 and 2013, this Court did not consider that at a post-2002 resentencing one single juror voting in favor of a life recommendation precluded the imposition of a death sentence.

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

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

analysis." *Id* (emphasis added).

Reed was tried in late 1986. In the 30 years since Reed's trial, there have been significant advances in forensic science. What passed for science in criminal trials in 1986 was often at best junk science. Here, the State relied on microscopic hair analysis to present evidence that Reed's hair was "microscopically the same" as a hair found on the victim's clothing and that Reed's pubic hair was microscopically the same as a pubic hair found in a combing from the victim. Such microscopic hair analysis is no longer used because mitochondrial DNA is definitive and conclusive, and because mitochrondrial DNA testing has shown the unreliability of microscopic hair analysis which was done in this case.

The State also presented serological evidence that showed that Reed's blood type and secretor status placed him within the 56 to 57 percent of the male population that could have contributed the semen found on a vaginal swab taken from the victim. Evidence that Reed is within the 56 percent of the male population that may have contributed the biological material does not tend to prove a material fact and does not qualify as relevant evidence.[9] It cannot be the basis for proof of guilt

[9]The prosecutor argued that the FDLE analyst had "typed the semen, the sperm found in [the victim's] body" and that the blood type of the sperm was consistent with Reed because he had raped and murdered the victim. But, Reed was a non-secretor. If a blood type had been found, Reed was not the contributor. The

beyond a reasonable doubt.[10] The serological evidence was at best meaningless, at worst misleading.[11]

The State also presented testimony that Mr. Reed's fingerprint was found on a check at the victim's residence. Because Reed had lived in the victim's residence a few weeks before the homicide, the State had an "expert" testify that he could tell that the fingerprint was "fresh" and had been left at the time of the homicide. It has been acknowledged in 3.851 proceedings that the freshness of a fingerprint cannot be ascertained and the testimony of the "freshness" expert had no basis in science or in fact.[12]

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prosecutor's misrepresentation of the evidence confused the jury. It asked for a read back of the testimony. After the read back, it sought a definitive answer as to whether Reed's non-secretor status meant that his blood type could be determined from his sperm. The judge refused to answer the question.

[10]This Court ordered the entry of a judgment of acquittal in *Dausch v. State*, 141 So. 3d 513, 519 (Fla. 2014), even though the DNA match there narrowed the percentage of individuals who could have contributed the biological material well below 56 percent of the male population ("Dr. Ragsdale conceded that the impact of the tenfold deviation meant that the frequency with which the DNA profile linked to Dausch could be found in the human population ranged from 1 in 2900 Caucasians to 1 in 29 Caucasians.").

[11]Indeed, the serological evidence in Reed's case is similar to the serological evidence presented at the trial in Paul Hildwin's case, which DNA testing conducted in collateral proceedings there exposed as nonsense. *See Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014).

[12]As noted *infra*, *Brady* material was not disclosed that established that the fingerprint examiner had reason to curry favor with the State.

On direct appeal, this Court struck 2 of the 6 aggravators presented to the jury.[13] This Court struck the previously convicted of a prior crime aggravator and the CCP aggravator. To the jurors, these would have been 2 weighty aggravators. This Court found error in the penalty phase proceedings because at the time, it would have taken 6 jurors voting to recommend a life for the jury's verdict to constitute a life recommendation, at a post-2002 penalty phase, it would have been just one.

In Reed's initial collateral proceedings, this Court recognized that favorable information in the State's possession was withheld from the defense. However, this Court said that the third prong of the *Brady* standard was not met - the withheld information was not material because a reasonable probability of a different outcome had not been shown. *Reed v. State*, 875 So. 2d

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[13]On direct appeal, Reed was represented by the same attorney who represented him at trial, Richard Nichols. On June 1, 1987, Nichols filed a ten page, one issue brief. After receiving this 10 page, one-issue initial brief, this Court issued an order finding that the brief "does not appear to be a good faith effort to address all of the issues available on appeal." *Reed v. State*, FSC Case No. 70,069 (September 9, 1987). This Court relinquished jurisdiction for a determination of "either that Reed's current counsel can fulfill his responsibilities as an appellate lawyer by filing an adequate supplemental brief or that new counsel should be appointed." *Id*.

Again, this was the same attorney who abandoned the public defender's motion for the appointment of a confidential mental health expert to assist the defense, who chose to present no evidence at the guilt phase of Reed's trial, who chose to present no mitigating evidence at the penalty phase of Reed's trial and who chose to call no witnesses (T921) and make absolutely no argument at Reed's sentencing (T928-31).

415, 432 (Fla. 2004). The undisclosed information included the fact that the finger print examiner who worked in FDLE's crime lab and claimed he could tell that the Reed's fingerprint was "fresh" had admitted to stealing and using cocaine while on the job analyzing evidence in June of 1986.[14] Before testifying at Reed's trial in November of 1986, the expert had been fired, had undergone a criminal investigation by the Duval County State Attorney's Office with no charges filed, and at the time of his testimony was hoping to get his job with FDLE back.[15] None of this sordid history was known by the defense or by the jury when the expert said the fingerprint was fresh and must have been left at the time of the homicide.

As to Reed's claim that he received ineffective assistance of counsel,[16] this Court denied the claim because it concluded

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[14]Since Reed had lived in the victim's house a month before the homicide, the scientifically unreliable and wholly unsupportable claim that the fingerprint was fresh was necessary to make the presence of Reed's fingerprint have any significance. And the FDLE examiner was highly motivated to curry favor with the State and help the prosecutor obtain a conviction in light of the undisclosed *Brady* information.

[15]At the October 14, 1986, hearing, the State's motion to compel samples of Reed's fingerprints was heard. The motion was granted, and the State indicated that the fingerprint examiner, Bruce Scott, was present in the courtroom (T29-30). What was not mentioned was the fact that Scott had been suspended from his job as an FDLE fingerprint analyst on June 4, 1986 (over 4 months earlier), and resigned his position shortly thereafter, due to his theft and ingestion of cocaine from the FDLE crime lab.

[16]Reed's counsel, Nichols, stipulated to the presentation of no mitigating evidence at the penalty phase proceeding and said

that Reed failed to satisfy the *Strickland* standard.[17] Reviewing the unpresented mitigation, this Court concluded that there was not a reasonable probability of a different outcome, i.e. six jurors voting for a life recommendation.[18] *Reed v. State*, 875 So. 2d at 437.[19] But at a future resentencing, this mitigating evidence would be admissible and need to convince one juror.

This Court also found that prosecutor-Bateh made improper

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that the absence of mitigating witnesses was: "because of finances and logistics, none of those witnesses are available" (SPC-R1 86).

[17]Chipperfield, Reed's original public defender who Bateh was able to conflict off the case, explained when called to testify at the 2002 evidentiary hearing that he and his co-counsel (Charlie Cofer) "were real concerned with Grover Reed's history of huffing gasoline and the hospitalization that he had after huffing gasoline and doing drugs where he was having convulsions and where they found an organic problem with his brain." (PC-R1 1191). Chipperfield was aware that Reed had been huffing gasoline since the age of nine and had been diagnosed in records as having "lead encephalopathy due to chronic lead poison seizure disorder caused by valium withdrawal or lead encephalopathy." (2/21/2002 Tr. at 73-74). According to Reed's live-in girlfriend, Chris Niznik, Reed was huffing gasoline and injecting cheap homemade crystal meth in early 1986 (PC-R1 1263-65).

[18]After not presenting any mitigating evidence to the jury, Nichols, Reed's trial counsel, did indicate that he would "like to file with the clerk" hospital records that "have to do with Mr. Reed's mental state as a result of some drug dependency and some toxic response to some lead from, I think it was what they allege was sniffing gasoline over a long period of time" (T921). At the same time, Nichols indicated he would "also like to file with the clerk" hospital records relating "to Mr. Reed's past emotional and drug problems" (T922).

[19]At that time, six jurors would have had to vote for a life recommendation before the jury's verdict would be a life recommendation. Five jurors would have had to switch their votes.

argument in his penalty phase closing. *Reed v. State*, 875 So. 2d at 438 ("the jury should 'show that defendant the same mercy and sympathy that he showed Betty Oermann on February 27, 1986 and that was none.' This Court clearly disapproves of this type of argument."). Bateh regularly engaged in improper penalty phase arguments. *See Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000) ("After carefully reviewing the prosecutor's penalty phase closing argument in this case, and considering the jury's close seven-to-five recommendation that Brooks be sentenced to death, we determine that the objected-to comments, when viewed in conjunction with the unobjected-to comments, **deprived Brooks of a fair penalty phase hearing**.") (emphasis added); and *Urbin v. State*, 714 So. 2d 411, 422 (Fla. 1998) ("The fact that so many of these instances of misconduct are literally verbatim examples of conduct we have unambiguously prohibited in *Bertolotti*, *Garron*, and their progeny simply demonstrates that there are some who would ignore our warnings concerning the need for exemplary professional and ethical conduct in the courtroom.").[20] *See also Thomas v. State*, 838 So. 2d 535, 542 n.8 (Fla. 2003).

[20]In *Brooks*, this Court specifically noted that "the comments made by the prosecutor in this case are strikingly similar to comments made by the same prosecutor which were condemned in *Urbin*." *Brooks v. State*, 762 So. 2d at 899. This Court made reference to "this prosecutor's 'track record,'" when vacating the death sentence because of the "improprieties in the prosecutor's penalty phase closing argument." *Id.* at 905.

In the 3.851 motion filed in 2010, Reed presented affidavits from 2 individuals who heard an individual named Kirkland confess to a Jacksonville murder that matched the facts of the murder for which Reed was convicted.[21] *Reed v. State*, 116 So. 3d 260, 265 (Fla. 2013). Kirkland, a black male, matched the description provided to the police of a suspect near the victim's home close to the time of the murder:

> Edith Bosso's interview statement to police of her observations on the evening of February 27, 1986, wherein she stated that when she was returning home from the dog track, she saw a black man walking in the neighborhood at about 6:30 p.m. toward Ortega Forest Drive. Bosso described the man as wearing dark clothes and having something sticking out of his back pocket. She described this man as slender and about six feet in height.

Reed v. State, 116 So. 3d at 265. Reed is a white male, "five foot six, his weight at 165" (PC-R1 945). This new information about Kirkland which was consistent with Bosso's observation at the time of the homicide would be admissible at a resentencing. This must be considered along with the admissible evidence showing the forensic evidence presented by the State to be

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[21]The affidavits from Hazen and Kormondy demonstrated that a dying Dwayne Kirkland confessed to a murder in Jacksonville of a older white woman in February of 1986. He described what happened and how she was killed. Court records indicate that Kirkland was on the streets in early 1986, wanted on a capias that issued in November of 1985, but for which he was not arrested until July of 1986 (PC-R2 35-36). And this Court's opinion in the murder case for which Kirkland was convicted and sentenced to death certainly shows that the manner in which Kirkland killed bears a striking resemblance to the murder of Betty Oermann.

unreliable, the undisclosed *Brady* information and admissible impeachment it revealed, and the admissible mitigating evidence which was not presented in 1986. The amount of new information that is now available and would be admissible is simply staggering.

Also, the errors that occurred at the trial would not be permitted at a resentencing. This includes the prosecutor's misrepresentation of the serological evidence in his closing argument, Bateh's improper penalty phase closing argument, the submission of two improper aggravating factors, and defective jury instructions on the remaining aggravating factors. 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 extremely likely that a less severe sentence would have resulted and/or will result at resentencing governed by the post-2002 law set forth in *Mosley*.

D. Conclusion.

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

REED 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, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. 584-85 (emphasis added).[22]

Reed's case is filled with indicia of unreliability. In

[22]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.'").

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 Reed's 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 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.

Reed's 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 Reed's death sentence and remand for a new penalty phase.

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 22nd day of March, 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.

/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

Counsel for Mr. Reed