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CASE NO. 84,977
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Appellant/Cross-Appellee,

v.

DONALD GUNSBY,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.
Douglas J. Chumbley, Esquire
Florida Bar No. 365301
Bruce A. Peterson, Esquire
Minnesota Bar No. 85637
4000 International Place
100 S.E. Second Street
Miami, Florida 33131

GREENE ESPEL
John M. Baker, Esquire
Minnesota Bar No. 174403
Suite 1700
333 South 7th Street
Minneapolis, Minnesota 55402

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INTRODUCTION

In this Reply Brief, Mr. Gunsby first demonstrates that several alternative bases exist for affirming the circuit court's order granting penalty phase relief. However, Mr. Gunsby also seeks a new trial on guilt/innocence because of the multiple Brady violations, instances of ineffective assistance of counsel, and items of newly discovered evidence set forth in his opening brief. The state's response, essentially, has been to attack each of these claims and subclaims in a vacuum. Repeatedly, the state points to the existence of other items of evidence to establish lack of prejudice, without acknowledging that virtually all of those items, too, are the subject of separate claims by Mr. Gunsby. Not only does the state's Answer Brief fail to rebut any of Mr. Gunsby's individual claims effectively, but more important, the state does not even attempt to argue that, in spite of all the errors viewed collectively, Mr. Gunsby received a fundamentally fair trial.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE PRESENTING DONALD GUNSBY'S EXTRAORDINARY BACKGROUND.

The state argues that, despite Mr. Scott's own testimony to the contrary, trial counsel's presentation of Mr. Gunsby's background was reasonable. Not only does the record reflect otherwise, but ignoring the kind of evidence that should have been presented by Mr. Scott has been held to be violative of Strickland in other death penalty cases.

Trial counsel devoted a total of 11.7 hours to the penalty phase, never interviewed any of Mr. Gunsby's seven cousins or one natural sibling, and failed to investigate Donald's birth, childhood or upbringing. Mr. Scott called Johnnie Mae Gunsby to the stand, without preparation, and even the state conceded that her testimony was "abbreviated." PCT 486.[1] The information that the jury would have heard from those witnesses at the 3.850 hearing would have painted a far different picture of Donald's life.

The state claims that this testimony is cumulative. However, a reasonable investigation into Mr. Gunsby's background would have revealed many aspects of his life that were never presented to the jury--hunger, abject poverty, abuse, neglect, heavy drinking and a lack of education. Donald Gunsby was severely developmentally delayed, and virtually no positive adult influences were available to him throughout his childhood. Nor did the jury know that even so, Mr. Gunsby developed into a hard worker and supported his family from an early age. See, e.g., PCT 461-66; 468-69; 478; 484-85; 489-94; 496-500; 502-05; 509; 535-36; 549; 559; 1026-27.

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[1] Original Guilt Transcript ("OGT") refers to the transcript of the guilt phase of Mr. Gunsby's trial on November 8-9, 1988. Original Penalty Transcript ("OPT") refers to the transcript of the penalty phase of Mr. Gunsby's trial on December 13, 1988. Post-Conviction Transcript ("PCT") refers to the transcript of the Rule 3.850 hearing on March 14-17, 1994, which begins at Vol. XXII of the Post-Conviction Record, which is abbreviated "PCR." Exhibits used during the 3.850 hearing will be referenced as "Def.'s Ex. __" and "State's Ex. __". Appendix ("App.") refers to the Appendix of the Initial Brief of Appellee/Cross-Appellant.

The 3.850 hearing revealed that Johnnie Mae Gunsby was anything but, as the state contends, the most knowledgeable and least impeachable witness. The testimony showed that Johnnie Mae Gunsby was unable or unwilling to acknowledge the severity of the family's problems. See, e.g., PCT 455-56; 470-71; 473. Even incidental contact with other relatives by trial counsel would have produced a far more compelling account of Donald's hardships. See, e.g., PCT 491-94; 499-500; 529-31; 537-38; 543-45. Moreover, at the 3.850 hearing, Mr. Gunsby called important non-family witnesses to the stand--a minister and civic leader, a former sheriff's deputy, and a former school teacher, among others. See, e.g., PCT 515-16; 520-24; 635-36; 1011-12. All of these witnesses were available to Mr. Scott but he never even talked to any of them.[2]

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[2] The state's contention that testimony relative to Jasper is irrelevant ignores the circumstances of Donald's birth, that his mother dropped him as an infant, that he was a product of a rape, that he was neglected, and that his family was subjected to a vicious brand of racism and social deprivation. All of these are relevant mitigating factors. See, e.g. Heiney v. State, 620 So.2d 171,173 (Fla. 1993); Stevens v. State, 552 So.2d 1082, 1086 (Fla. 1989); Holsworth v. State, 522 So. 2d 353-55 (Fla. 1988); Hansborough v. State, 509 So.2d 1081, 1086-87 (Fla. 1987).

The state's assertion that Heiney v. State is not applicable to this case because it was a jury override case is misplaced. The state cites no caselaw to support its contention, and the message from Heiney is clear:

> "The issue we must address in the instant case is whether the mitigating evidence which existed and could have been presented at Heiney's sentencing raised a reasonable probability that, absent the lawyer's deficient performance, the outcome of the penalty proceeding would have been different."

Heiney, 620 So.2d at 172. The Heiney court found that trial counsel did not make decisions regarding mitigation for tactical

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO *WITHERSPOON* ERRORS.

A. Mr. Gunsby's Witherspoon-Based Ineffective Assistance of Counsel Claims Are Not Procedurally Barred.

The state's procedural bar argument ignores Florida law and practice. This Court has consistently recognized that ineffective assistance of counsel claims raised on direct appeal are premature and should be raised in a post-conviction relief motion. McKinney v. State, 579 So.2d 80 (Fla. 1991); Owen v. State, 560 So.2d 207 (Fla. 1990) (ineffective assistance of counsel claims " . . . are more properly raised in a motion for postconviction relief."), cert. denied, 498 U.S. 855, 111 S.Ct. 152 (1990); Kelley v. State, 486 So.2d 578 (Fla.) (same), cert. denied, 479 U.S. 871, 107 S.Ct. 244 (1986). McKinney explained the rationale for raising ineffective assistance claims at the 3.850 stage:

> The trial court is the more appropriate forum to present such claims where evidence might be necessary to explain why certain actions were taken or omitted by counsel.

McKinney, 579 S.2d at 82.[3]

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reasons because he did not even know that mitigating evidence existed. The state now suggests that Mr. Gunsby's counsel made strategic decisions regarding mitigation; this implication is directly contradicted by the record. PCT 283-87; 308-10. The facts of Heiney are strikingly similar to the instant case, and the state cannot hide behind the fact that Heiney involved a jury override to defeat Mr. Gunsby's claims.

[3] Federal courts have similarly recognized that ineffective assistance of counsel claims should not be considered first on direct appeal because there is an insufficient opportunity to develop the record regarding the merits. See United States v. Camacho, 40 F.3d 349 (11th Cir. 1994); United States v. Perez-Tosta, 36 F.3d 1551 (11th Cir. 1994); United States v. Arango, 853 F.2d 818 (11th Cir. 1988) (ineffective

Mr. Gunsby followed McKinney and developed an evidentiary record at the 3.850 hearing to support his Witherspoon-based ineffective assistance claim. At the 3.850 hearing, Mr. Gunsby's trial counsel admitted that he had no strategic basis for failing to object to the trial court unilaterally striking jurors Michael and Durchak for cause without the proper Witherspoon inquiry. PCT 304. Trial counsel later confessed that he simply did not know enough elementary death penalty constitutional law to assert the proper objections. PCT 305. Mr. Gunsby cannot be procedurally barred for following this Court's command to develop a 3.850 evidentiary record before bringing ineffective assistance claims.[4]

B. Mr. Gunsby's Witherspoon-Ineffective Assistance of Counsel Claims Are Meritorious.

The state's substantive arguments also fail. Contrary to the state's representations, this Court did not make any "findings" or establish any "law of the case" regarding trial counsel's ineffective Witherspoon performance. As described above, this Court merely found Mr. Gunsby's underlying Witherspoon errors procedurally barred by trial counsel's failure

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assistance of counsel claims may not be considered on direct appeal and are properly raised by collateral attack in district court).

[4] The Fifth Circuit recently rejected Texas' argument that a procedural default barred consideration of a defendant's ineffective assistance claim premised upon Witherspoon. Duff-Smith v. Collins, 973 F.2d 1175, 1182-83 (5th Cir. 1992) ("Under Strickland, however, Duff-Smith may still raise the merits of this issue through an ineffective assistance of counsel claim.") (citing Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986); Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984)), cert. denied, 113 S.Ct. 1958 (1993).

to act. There were no "findings" by this Court about the propriety of the jury selection.

The state's further suggestion that this case's Witherspoon errors are "open to debate" plainly ignores Sanchez-Velasco v. State, 570 So.2d 908, 915-16 (Fla. 1990), cert. denied, 500 U.S. 929, 111 S.Ct. 2045 (1991). The state's failure to even address Sanchez-Velasco speaks volumes about the significant Witherspoon errors which occurred without any objection or action by Gunsby's trial counsel.[5]

Trial counsel's failure to object to the trial court's Witherspoon/Sanchez-Velasco errors prejudiced Mr. Gunsby. Gray v. Mississippi, 481 U.S. 648, 659, 107 S.Ct. 2045, 2052 (1987).[6] If the trial court had overruled trial counsel's objection, the Witherspoon violation -- a per se reversible constitutional error -- would have been preserved and Mr. Gunsby's death sentence would have been automatically vacated by this Court on direct

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[5] The state's reliance on the Witherspoon questioning in Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464 (1986) is misplaced. The Darden trial court asked a specific question to the entire venire concerning any juror's unalterable opposition to the death penalty and then individually voir dired all potential jurors before excusing any for cause. Id. at 177, 106 S.Ct. at 2469 ("The court repeatedly stated the correct standard when questioning individual members of the venire. . . . the court ask[ed] the proper Witherspoon question over and over again.") (footnotes omitted). In contrast, Mr. Gunsby's trial court excused at least two jurors without asking either generally or individually about the death penalty.

[6] The state's "square peg in a round hole" cliche apparently concedes Mr. Gunsby's argument that Gray's per se prejudice applies to any Witherspoon error. State Answer Brief at 32 n.12. Since there were Witherspoon errors and trial counsel was deficient in preserving those errors, Mr. Gunsby suffered Strickland's requisite prejudice.

appeal. If the trial court had sustained trial counsel's objection, there is only hopeless speculation -- condemned by Gray -- about what might have ultimately happened. In either case, Mr. Gunsby's trial counsel ineffectively represented his client's Witherspoon rights.[7]

III. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE UNCONSTITUTIONALLY VAGUE JURY INSTRUCTION ON "COLD, CALCULATED AND PREMEDITATED" CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Gunsby's jury was instructed that it could consider whether his crime was "cold, calculated and premeditated" as an aggravating factor. The exact jury instruction used in Mr. Gunsby's case was later found to be unconstitutionally vague by this Court in Jackson v. Dugger, 648 So.2d 85, 87 (Fla. 1994) and a similar instruction was found to be unconstitutionally

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[7] The state's procedural and substantive arguments opposing Gunsby's reverse-Witherspoon also fail. Contrary to the state's argument, Duest did not hold that an argument presented in a footnote is waived. State Answer Brief at 32 (citing Duest v. Dugger, 555 So.2d 849, 851-52 (Fla. 1990)). Instead, Duest rejected arguments which were only referenced but not argued:

> Merely making reference to argument below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

Id. at 852. In contrast to Duest, Mr. Gunsby based his reverse-Witherspoon analysis on case law from this Court and the United States Supreme Court. Defendant's Initial Brief at 57 n.27 (citing Willacy v. State, 640 So.2d 1079 (Fla. 1994); Gore v. State, 475 So.2d 1205 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986); Morgan v. Illinois, 504 U.S. 719 (1992)). There is no procedural bar.

The state's reverse-Witherspoon argument substantively fails because it ignores the fact that neither Mr. Gunsby's trial counsel nor the trial court asked a single reverse-Witherspoon question of perspective jurors Michael and Durchak. OGT 11. The failure of Mr. Gunsby's trial counsel to object or request reverse-Witherspoon questioning of these prospective jurors is yet another example of trial counsel's ineffective assistance throughout trial.

vague by the United States Supreme Court in Espinosa v. Florida, 112 S.Ct. 2926 (1992). If Mr. Gunsby's attorney had objected to the instruction at his trial, as any attorney with even a passing familiarity with criminal defense in Florida would have done, under Jackson Mr. Gunsby's conviction would be overturned now. The failure of Mr. Gunsby's attorney to preserve the objection for appeal constitutes ineffective assistance of counsel.

The state, of course, argues that Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995), forecloses Mr. Gunsby's argument. The court in Harvey considered decisions of this Court upholding the instruction and determined that failure to object could not be considered ineffective assistance of counsel. Nevertheless, Mr. Gunsby maintains this claim because any competent or effective trial counsel would have made an objection, despite these prior decisions, anticipating a possible change in the law.

IV. MR. GUNSBY WAS INCOMPETENT TO STAND TRIAL.

The state contends that the implicit finding of competency by the 3.850 hearing judge was not an abuse of discretion because, essentially, the evidence of incompetency was equivocal and was more than outweighed by trial counsel's view that Mr. Gunsby was competent and able to communicate with him.[8] The

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[8] The state's procedural bar argument is incomprehensible. Other than the otherwise discredited testimony of Dr. Conley, there was no evidence to support a claim of incompetency until the 3.850 hearing, where Dr. Phillips and Dr. Caddy thoroughly evaluated the defendant and rendered their respective competency opinions, Dr. Mhatre completely reversed himself, and Dr. Poetter substantially modified his opinion. Thus, this incompetency claim could not have been raised on direct appeal in any meaningful fashion.

state also asks this Court to rely on the view of the original trial judge "who ruled on the original competency motion, had the opportunity to observe the defendant's demeanor and interaction with his attorney, as well as the opportunity to observe Gunsby throughout his trial." State Answer Brief at 34. The state is wrong on all counts.

To begin with, the state does not provide a record citation for the original trial judge's ruling "on the original competency motion," and there is no such ruling in the record. There is no record that a competency motion was ever made by trial counsel. Presumably the reason counsel failed to make such an obvious motion for a client with an IQ of 57 is that, as the state correctly points out, trial counsel believed Mr. Gunsby was competent and could communicate with him. However, as two of the most sophisticated forensic experts in the country explained at the 3.850 hearing, that is precisely the problem -- Donald Gunsby has perfected the ability to pass for someone of much greater intelligence. Dr. Phillips compared Mr. Gunsby to the Peter Sellers character in the movie "Being There," i.e., someone who has learned to nod in response to a communication, look appropriate, and project a level of intelligence. PCT 940-944. Unfortunately, that act fools the communicator, who then fails to take the necessary steps to insure that any communication has taken place. Dr. Phillips and Dr. Caddy were both of the opinion that meaningful communication between Mr. Gunsby and his original attorney had not taken place. PCT 810-812, 852, 957-58. While someone who does not know where the sun rises might not

necessarily be totally unable to provide meaningful assistance to his lawyer, an absolute pre-condition for such meaningful assistance would be the lawyer's recognition that special attention is required. While the state is correct that, under ordinary circumstances, trial counsel's opinion regarding competency is entitled to substantial weight, under these particular circumstances the very naivety of counsel's opinion merely underscores the problem.

The state is also correct that the evidence of incompetency is not a seamless web of perfection. Dr. Mhatre's policy of terming every defendant with an IQ under 70 incompetent is probably "absurd." At the very least, however, his reversal of his opinion nullifies his original finding of competence and suggests that during his superficial examination he, just like trial counsel, was fooled by Mr. Gunsby's acting ability. It is also true that at one point Dr. Caddy said "may" in expressing his opinion on competency. PCT 816. How much more certain could someone be in discussing an individual's state of mind six years earlier? This Court would have more reason to doubt Dr. Caddy's opinion if he had been absolutely certain. As for Dr. Phillips, the state's attack on his use on the phrase "clinically meaningful" seems a little unfair, since it is absolutely clear from the total context of his testimony that he meant Mr. Gunsby failed to meet the Dusky standard at the time of his trial in 1988. PCT 956-958. Dr. Poetter's testimony, of course, is particularly interesting, since he evaluated Mr. Gunsby at the time of the trial. It is true that he did not completely reverse

his original finding of competency. In response to direct questions by the court at the 3.850 hearing, however, Dr. Poetter acknowledged that his opinion of competency had serious limitations and that the defendant would "absolutely" require "a lot of special attention." PCT 901-903. It is apparent from trial counsel's time records and lack of awareness of any problem that Mr. Gunsby failed to receive that care and attention. PCT 811-812, Def.'s Ex. 69, App. at 41. The most logical interpretation of Dr. Poetter's testimony in context is that it supports a finding of incompetency, and it certainly cannot be termed evidence of competency.

The state's response to this claim leaves this Court in an unusual position. While the state makes some relatively minor points about the imperfections in the evidence of <u>incompetency</u>, the most important thing about the state's brief is that it offers little evidence of <u>competency</u>.[9] The state primarily asks this Court to rely on the first-hand observations of the original trial judge, which it turns out are nowhere to be found in the record. Mr. Gunsby did not say a single word on the record at the 3.850 hearing, so the lower court was not in any better position to evaluate his competency than this Court. The evidence at the 3.850 hearing overwhelmingly favored incompetency

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[9] Other than trial counsel's naive view of his client described above, the state refers only to Mr. Gunsby's ability to "rationally and coherently discuss his case with another inmate." State Answer Brief at 35. Mr. Gunsby's contribution to this "rational and coherent" discussion, however, consisted principally of repeated statements that Bennie Brown was lying. OGT 391-395. The other inmate never opined on Gunsby's ability to communicate.

over competency, and the only just result is for this Court to vacate the original conviction as a denial of due process.

V. **MR. GUNSBY RECEIVED INEFFECTIVE ASSISTANCE OF EXPERTS.**

The state raises two objections to the merits[10] of this claim, one legal and one factual. Citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992), the state argues that there is no due process violation when the defendant cannot pinpoint the ruling in which the trial court denied him due process. State Answer Brief at 42-43. The state's legal position is too narrow -- the idea of "pinpointing" a ruling was a specific reference to the unique factual circumstances present in Clisby. The real question in Clisby was whether information available to the trial

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[10] The state argues that this claim is "barred by a double layer of procedural bar." State Answer Brief at 38. The state is wrong about both levels. To begin with, this claim could not have been raised on direct appeal because the nature of the deficiencies in the experts' evaluations of Mr. Gunsby were not apparent from the original record. It was only when Dr. Phillips and Dr. Caddy examined Mr. Gunsby in 1993 and 1994 that the scope of the errors in the prior examinations became apparent. Moreover, Mr. Gunsby raised this issue with the 3.850 hearing court as soon as he was able. In his original 3.850 motion, Mr. Gunsby cited State v. Sireci, 502 So.2d 1221 (Fla. 1987), and noted that a new sentencing hearing is mandated where psychiatric examinations are grossly insufficient. PCR 463. Sireci was cited in the context of the ineffective assistance of counsel claim, because it was only when all three experts who examined Mr. Gunsby at the time of the original trial admitted important errors at the 3.850 hearing that the independent nature of this claim became apparent. Thereafter, in the Defendant's Proposed Findings of Fact and Conclusions of Law submitted to the trial court after the conclusion of the evidentiary hearing, in a section entitled "Deficient Expert Evaluations," Mr. Gunsby proposed and briefed the following conclusion of law:

> The court-appointed mental health experts failed to perform competent and appropriate evaluations of defendant's mental health in preparation for the penalty phase of defendant's trial, requiring a new penalty phase hearing. PCR 3074-76

court should have led the trial court to conclude that the defendant would probably not receive a fair trial such as, for example, "facts that could have indicated to the trial court that the psychiatrists who examined petitioner provided incompetent assistance." Id. at 929-930. At the very least, for the trial court here to have watched Dr. Mhatre testify at the original penalty phase proceeding that there was essentially nothing wrong with Mr. Gunsby should have caused the court to take steps to ensure a fair trial. If Mhatre's testimony wasn't enough, the trial court should not have sat idle while an inexperienced defense lawyer put the unqualified Dr. Conley on the stand and permitted him to testify to a groundless diagnosis that was flatly contradicted by Dr. Poetter. Moreover, this Court in the first Sireci case, 502 So.2d 1221, 1224 (1987), established a standard that was independent of direct action by the trial court itself: "However, a new sentencing hearing is mandated in cases which entail psychiatric examination so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." This is precisely what Dr. Mhatre did, and while Dr. Conley's and Dr. Poetter's errors were of a slightly different variety, they were no less damaging.

As to the facts, the state argues that Mr. Gunsby did not suffer from the kind of expert incompetence that implicates Sireci. The state argues that whether or not Dr. Mhatre made any errors at trial does not matter because Mr. Gunsby had an expert of his own. However, as explained at length in Mr. Gunsby's opening brief, the problem with the presentation of mental health

evidence at the penalty phase was that the experts all contradicted each other, thereby undoubtedly rendering the whole effort meaningless to the jury. The state is also simply wrong in asserting "Dr. Poetter's testimony was favorable to Gunsby. . ." State Answer Brief at 41. Dr. Poetter's description of Mr. Gunsby's supposed anti-social personality disorder was extremely damaging (OPT 65), and his failure to articulate the limitations on his opinion regarding statutory mitigating factors played right into the hands of the prosecution. OPT 58-61.

VI. EXECUTION OF THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

The state argues that courts have refused to flatly prohibit execution of the mentally retarded.[11] The state is correct about this proposition as a general rule. However, the state ignores Mr. Gunsby's argument that there is an emerging consensus against executing the mentally retarded. See, e.g., Penry v. Lynaugh,

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[11] The state initially argues that Mr. Gunsby is procedurally barred from raising this argument because it was not pursued on direct appeal. While the state accurately states this general rule, it fails to address the three arguments advanced by Mr. Gunsby to demonstrate that the general rule is inapplicable here: Mr. Gunsby could not have made this argument below because unequivocal evidence of his severe mental retardation was not available at the time of his direct appeal; a challenge based on fundamental error must be allowed when required by fundamental fairness; and the direct appeal of Mr. Gunsby's conviction was prior to the decisions moving closer to and providing a rationale for banning execution of the mentally retarded.

The state cites Woods v. State, 531 So.2d 79 (Fla. 1988) for the general proposition that failure to raise a claim on direct appeal bars consideration of the claim in a collateral proceeding. The Court in Woods summarily dismissed the defendant's claim and did not consider any of the arguments raised here.

492 U.S. 308 (1989); Thompson v. State, 648 So.2d 692, 697 (Fla. 1994), cert. denied, 115 S.Ct 2283 (1995) (mental retardation is a considerable mitigating factor); Allen v. State of Florida, 636 So.2d 494 (Fla. 1994) (execution of a defendant for a crime committed while he was under the age of 16 is "cruel or unusual" punishment); Hall v. State, 614 So.2d 473 (Fla. 1993)(dissenting opinion), cert. denied, 114 S.Ct. 109 (1993) (execution of the mentally retarded is cruel and unusual punishment). These cases provide support for such a ban as fully discussed in Mr. Gunsby's opening brief.

VII. THE CIRCUIT COURT ERRED IN FAILING TO ORDER A NEW TRIAL DESPITE THE STATE'S REPEATED FAILURE TO DISCLOSE BRADY INFORMATION.

In one of many misstatements of the evidentiary hearing records, the state contends that "there is no record support for the defendant's claim that Tony's criminal charges were disposed of as a result of his status as a witness in this case." State Answer Brief at 50. In fact, Mr. Awadallah's defense counsel testified at the evidentiary hearing of how he successfully exploited his client's status as a witness for the state in the Gunsby matter in order to obtain a "sweet deal" on charges pending against Mr. Awadallah. As the circuit court's Order reflects,[12] the circuit court credited his testimony in all respects:

> Mr. Awadallah's attorney contacted the prosecutor in the Gunsby case and discussed a

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[12] Each aspect of the circuit court's findings on this point was established through the testimony at the evidentiary hearing of Ronald Fox, Esq. PCT 357-364.

> plea arrangement for Mr. Awadallah that would be beneficial to both the State and Mr. Awadallah. His attorney suggested that if adjudication of guilt were withheld against his client, it would be beneficial to the State because Mr. Awadallah, as a key witness for the State in the Gunsby case, would not be adjudicated of a felony and would not be discredited on the witness stand when asked by Mr. Gunsby's attorney during the trial whether he had ever been convicted of a felony. The prosecutor in the Gunsby case acknowledged that it would be beneficial to the State and agreed to what Mr. Awadallah's attorney referred to as a very "sweet deal" whereby adjudication of guilt would be withheld against Mr. Awadallah and he would be immediately released from jail upon acceptance of the plea from the court.

(Order, App. at 6-7).

A. Because the Circuit Court Incorrectly Applied the *Brady* Materiality Standard, it Makes No Difference that it May Have Recited the Test Correctly.

The state, in essence, argues that the circuit court must be presumed to have correctly applied the Brady test for materiality largely because in one instance the circuit court correctly quoted the test. Appellate courts are routinely confronted with cases in which a lower court has correctly articulated a legal standard but misapplied it in one respect or another. In such settings, the correct articulation of the standard does not insulate the misapplication of that standard from scrutiny and reversal on appeal. For example, in Kyles v. Whitley, ___ U.S. ___, 115 S.Ct. 1555 (1995), the lower court articulated its conclusion in a manner consistent with the proper analysis of Brady materiality. See 115 S.Ct. at 1569. When the Supreme Court focused on the lower court's application of the test, however, it found "repeated references dismissing particular

items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone." Id. Because the Supreme Court detected a flaw in the lower court's application of the test, the lower court was reversed.

The state asks this Court to hypothesize a finding in the circuit court's decision that is not the factual finding stated by the circuit court in its Order.[13] As the Kyles decision demonstrated, appellate courts must focus not simply on whether the lower court correctly recited the law, but on whether the law was correctly applied.[14]

Confirmation of the circuit court's error, of course, must be found in its action, not in its words. The circuit court

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[13] Contrast State Answer Brief at 50 ("The lower court found that there was no reasonable probability of a different result had the evidence been disclosed.") and 55 ([T]he trial court here found no reasonable probability of a different result.") with Order, App. at 9 (After describing the state's argument "that the defendant has failed to establish that the outcome of the trial would have been different" if the information had been disclosed, the circuit court held that it was "persuaded by this argument and finds that even if the information had been disclosed to the defense, the outcome would probably not have been different.")

[14] The sole authority cited by the state in support of this argument is Walton v. Arizona, 497 U.S. 639, 653 (1990). The state asserts that "the trial court is presumed to know and follow the law." (State Answer Brief at 51-2). However, Walton had nothing to do with appellate review of a lower court that had correctly stated the law but misapplied it. Instead, it involved a facial attack on the constitutionality of an Arizona aggravating circumstance statute which required the sentencing judge to determine if the crime was especially heinous, cruel or depraved. Walton, 497 U.S. at 652. The Supreme Court was addressing the question of whether decisions from cases in which a jury interpreted a vague aggravating circumstance instruction governed a case in which a judge, not the jury, applied the aggravator, once the state's highest court had clarified the meaning of the statute. Id. at 653.

upheld a conviction in spite of repeated Brady violations regarding a person conceded to be the state's key witness. One might think that such violations would usually "undermine confidence" in the outcome of a trial. It is not surprising that the state's brief fails even to mention Lindsey v. King, 769 F.2d 1034, 1042-43 (5th Cir. 1985), in which the Fifth Circuit explained at length the impact of impeaching the testimony of one of two crucial eye witnesses, even if the other remains untouched. The circuit court's action as well as its words demonstrate that it was speculating about the answer to an irrelevant hypothetical question -- would the outcome of the trial have been the same if the Brady material had been disclosed? The circuit court found this question to be "very close," and the court never even tried to explain how such a close question could not undermine confidence in the outcome of the trial. The decision should be reversed.

B. The State's Brief Trivializes the Impeachment Value of Tony Awadallah's Undisclosed Criminal History.

The state accuses the defense of overstating the impeachment value of the undisclosed criminal history of Tony Awadallah. That contention rests upon the false premise that Mr. Awadallah's account of the shooting never varied, and the dubious notion that Mr. Awadallah, as the brother of the decedent, would not have been affected by the multiple incentives to curry favor with the state arising from the criminal charges against him.

As Mr. Awadallah's incentives to curry favor with the state increased, his testimony became less equivocal and for that

reason more favorable to the state. In his original tape recorded statement to the police the night of the murder, Mr. Awadallah stated that, "by the time I looked the guy had, the guy's shotgun was already at the counter and he had shot my brother." These questions and answers followed:

> HL: Alright. You got a look at his face?
>
> NA: He had a hat on.
>
> HL: Yeah.
>
> NA: I think I know who he is.
>
> HL: Did you see his face?
>
> NA: A little bit of it.

Def.'s Ex. 95. After each of the numerous incentives to curry favor had come into play, however, Mr. Awadallah's testimony at trial lost all of its initial uncertainty. With undisclosed charges hanging over his head, Mr. Awadallah now testified without equivocation that he could see the assailant's face. OGT 240. He said he first saw the defendant when "[h]e was walking in." OGT 241, 248. He further testified that "[t]here ain't no doubt in my mind whatsoever" about who killed his brother: it was Mr. Gunsby. OGT 239, 240, 243. In this respect, Mr. Awadallah conveniently changed from an eyewitness whose ability to assist the state was largely disqualified by limitations on his ability to recognize the assailant, to an unequivocal eyewitness who identified the assailant at trial. Without the benefit of the undisclosed Brady information, however, the jury had no meaningful basis to decide which version to believe. If the jurors had known of Mr. Awadallah's incentives to curry favor

with the state, they would have had a plausible explanation for the change in his testimony, and they would have returned him to his proper role as a marginal and inconsequential witness.

C. The Supreme Court's Decision in *O'Neal* Is Applicable to State Post-conviction Proceedings.

Remarkably, the state attempts to distinguish the Supreme Court's recent decision in O'Neal v. McAnich, 115 S.Ct. 992 (1995), because "this proceeding is obviously not a federal habeas corpus proceeding." State Answer Brief at 54. The distinction between this state post-conviction review proceeding and a federal habeas corpus proceeding, however, cuts against the state. When a state conviction survives the state post-conviction review process, and is for that reason subject to review only in a federal habeas corpus proceeding, the conviction is entitled to the greatest presumption of correctness. See Brecht v. Abrahamson, 113 S.Ct. 1710, 1719 (1993). That greater degree of deference in federal habeas proceedings arises at least in part because, under principles of federalism and comity, federal courts should be especially reluctant to set aside state convictions. See Id. at 1720, Engle v. Isaac, 456 U.S. 107, 128 (1982).

However, when a Florida court reviews a Florida conviction under Rule 3.850, no such considerations of comity or federalism come into play. In fact, "state courts often occupy a superior vantage point from which to evaluate the effect of trial error." Brecht, 113 S.Ct. at 1721. Thus, if a principle is sufficiently compelling to justify setting aside a conviction in a federal

VIII. THE CIRCUIT COURT ERRED IN FAILING TO ORDER A NEW TRIAL BECAUSE MR. GUNSBY'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN INVESTIGATING AND PRESENTING EVIDENCE.

A. Mr. Scott's Failure to Depose James "Jap" Anderson.

The state argues that it was not deficient performance for trial counsel's to fail to "depose a tertiary witness about a minor issue." State Answer Brief at 56. The "minor issue", of course, was offered by the state at Mr. Gunsby's trial as an admission of guilt. OGT 227-28. The "tertiary witness", of course, was the person to whom the admission of guilt was made. Id. While trial counsel does not have to "discover every possible avenue which may hurt or help the client," he does, at a minimum, have to "investigate the obvious." House v. Balkcan, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984). If Jap Anderson was nothing else, he was an "obvious" witness who should have been deposed. Mr. Scott's failure to do so is deficient performance under any standard.

The state argues that Mr. Scott's performance was not prejudicial because of the other "unequivocal and independent evidence of guilt." State Answer Brief at 56. The state has chosen to ignore the point Mr. Gunsby has made throughout these proceedings: if the state had fulfilled its disclosure requirements under Brady, if Mr. Gunsby had received the effective assistance of counsel he was entitled to under Strickland, and if newly discovered evidence is considered, there would be no other unequivocal evidence of guilt. Mr. Gunsby's meritorious claims reach virtually every material piece of evidence in the state's case.

B. **Mr. Scott's Failure to Interview and/or Depose Lewis Barnes.**

The Strickland Court articulated two separate standards for evaluating "strategic choices" within the context of any ineffective assistance claim. One standard applies to cases involving strategic choices made "after thorough investigation," the other applies to strategic choices made "after less than complete investigation." Strickland v. Washington, 466 U.S. 668, 690-91 (1984). The state suggests that Mr. Scott's conduct must be evaluated under the first standard. However, it is undisputed Mr. Scott did no investigation regarding Mr. Barnes' knowledge. PCT 319. Therefore, his decision was not one of those "strategic choices" that is "virtually unchallengeable" as suggested by the state, but was one made, to say the least, "after less than complete investigation." Mr. Scott's decision can be considered a reasonable strategic choice only "to the extent that reasonable professional judgment supports the limitations" he placed on his investigation. Id. When judged against this standard, Mr. Scott's performance falls well below the range of reasonably competent performance under prevailing professional standards.

Mr. Scott's only reason for not interviewing or deposing Mr. Barnes was his own personal belief, based on his experience as a former Ocala policeman, that Mr. Barnes was not a credible witness. However, Mr. Scott was not evaluating Mr. Barnes as a witness in the capacity of a law enforcement official, he was evaluating him as the defense lawyer of a man charged with first degree murder. As the state's own use of Mr. Barnes as a key

habeas corpus proceeding, that principle should be at least as compelling on post-conviction review under Rule 3.850.

Again attempting to negate the effect of the O'Neal decision, the state contends that O'Neal "has nothing to do with this case because, unlike the apparent situation in that case, the trial court here found no reasonable probability of a different result." State Answer Brief at 55. The circuit court did not in fact find "no reasonable probability of a different result," but answered a different -- and wrong -- question. The circuit court improperly required Mr. Gunsby to establish that the outcome would have been different, and found the answer to that question to be "a very close question." Order, App. at 9. As the Tenth Circuit noted earlier this year.

> We do not sit to reweigh evidence, assess the credibility of witnesses, and decide whether the [undisclosed] information establishes the guilt of [another person] beyond a reasonable doubt or exonerates [the defendant.] [citations omitted] That is a decision left to the citizen jurors of the State of Oklahoma.
>
> Our task is considerably more narrow. The test is "whether we can be confident that the jury would have returned the same verdict had the Brady violation not occurred." Bartholomew v. Wood, 34 F.3d 870, 874 (9th Cir. 994), petition for cert. filed, 63 U.S.L.W. 3644 (Feb. 14, 1995); see Kyles, -- U.S. --, 115 S. Ct. 1555, 1574.

Banks v. Reynolds, 54 F.3d 1508, 1521 (10th Cir. 1995) (ordering new trial on postconviction review under 28 U.S.C. § 2254 based on Brady violations).

that "was not previously discoverable in the exercise of <u>reasonable</u> diligence. <u>Jackson</u>, 416 So.2d at 10; <u>see also</u> <u>Steinherst v. State</u>, 636 So.2d 498, 500 (Fla. 1994); <u>McCallum v. State</u>, 559, So.2d 233, 235 (Fla. App. 1990).

Ironically, in its eagerness to defeat an argument that Mr. Gunsby has not made, the state concedes that "reasonable diligence" would not have led to the discovery of Mr. Latson. According to the state, "[c]ounsel could have interviewed Alvin Latson . . . .[but] there was no information to suggest such an interview would have been productive." State Answer Brief at 60. Further, Opal Latson Sellers was deposed in preparation for the 3.850 hearing and she denied speaking with Alvin Latson about the shooting. Def's. Ex. 97 at 76. She also denied speaking with Alvin Latson during her 3.850 hearing testimony. PCT 220. Presumably she would have given the same testimony in 1988. Therefore, there is nothing in the record to suggest that "reasonable diligence" by Mr. Scott would have led him to locate and interview Alvin Latson.

The state also attempts to downplay the undisputed fact that Ms. Sellers is now known to be a liar who has demonstrated on a number of occasions that she is not worthy of belief. The state declares that Ms. Sellers' answer to the question of why she left employment with the Ocala Housing Authority is "not inappropriate to the question asked" (State Answer Brief at 63), but the record reveals otherwise. Having been terminated for theft (Def.'s Ex. 101, App. at 85), Ms. Sellers was asked: "Why did you leave the

witness in a murder case demonstrates, (PCT 322-23) given the appropriate factual context even the most tainted witness can become important. Mr. Scott never even bothered to find out what Mr. Barnes had to say (PCT 319), let alone the factual context underlying what he had to say.[15]

The evidence that Mr. Barnes could have offered at Mr. Gunsby's trial would have been extremely helpful to his defense because it directly discredited Tony Awadallah's eyewitness identification. When considered along with other evidence of Mr. Gunsby's innocence offered both at trial and the 3.850 hearing, this deficiency was prejudicial.

IX. THE CIRCUIT COURT ERRED IN FAILING TO ORDER A NEW TRIAL BECAUSE OF NEW DISCOVERED EVIDENCE.

A. The Testimony of Alvin Latson.

The state suggests that the due diligence standard for evaluating newly discovered evidence is inflexible and absolute. According to the state, the mere fact that evidence exists and could have been found means that that evidence cannot qualify as newly discovered evidence. State Answer Brief at 60. The law, however, is to the contrary. "[T]he due diligence requirement is not an inflexible one." Jackson v. State, 416, So.2d 10 (Fla. 1982) (emphasis added). Newly discovered evidence is evidence

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[15] The state claims that Def.'s Ex. 91 does not prove that Mr. Barnes and Tony Awadallah were held in the same area of the Marion County jail. Once again, the state misses the point. Def.'s Ex. 91 wholly undermines the state's cross-examination of Mr. Barnes, which attempted to show that Mr. Awadallah was not held in the administrative lock down where Barnes was held. Further, the state has offered no evidence to rebut Mr. Barnes' testimony that the conversation took place.

Ocala Housing Authority?" She answered: "To become full-time at the funeral home."[16] Def.'s Ex. 102.

The state has an even bigger problem with Ms. Sellers' denial that she was present when Tony Awadallah borrowed a gun from Alvin Latson (PCT 220-21), because in that matter she is contradicted not only by Alvin Latson but by Tony Awadallah. PCT 199-200; 232-33. Faced with the sworn testimony of its two eyewitness in direct conflict, the state terms the event: "At most, a collateral matter which has no bearing on the issue of her identification of Gunsby." State Answer Brief at 62. Again, the state misses the point. The question is whether the newly discovered testimony of Alvin Latson that Ms. Sellers said she did not see the face of the shooter because he was wearing a mask would probably produce an acquittal on retrial. Alvin Latson's testimony would probably produce an acquittal, of course, if the jury believed him rather than Opal Seller's denial. There were no third party witnesses to their exchange. But, in a related exchange between the two also involving Opal Sellers' state of mind about the shooting shortly afterwards, there was a third party witness present. This witness happened to be a third party whose credibility the state can in no way disparage, i.e., its principal eyewitness Tony Awadallah. That Tony Awadallah

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[16] The state's argument is also disingenuous because the state knows that, at the time of Opal Seller's 3.850 deposition, Mr. Gunsby was not aware of the reasons for her termination because the state failed to disclose it. It was not until after Ms. Sellers was deposed that the state disclosed the information about Ms. Seller's termination, information that it had in its possession at the time of her deposition.

supports Alvin over Opal in the second exchange would tend to lead any jury to conclude that Alvin is also telling the truth about the first exchange. What the state terms a "collateral matter" is in reality the hole in its case that will sink it on retrial.

Although the state does not deny that Opal Latson and James Colbert, one of the state's original suspects, were romantically involved, the state suggests that there is no evidence that Opal Sellers and James Colbert were involved at the time of the shooting. However, the evidence of when that involvement began is ambiguous at best. PCT 1005-1006. It is not surprising that neither Ms. Sellers nor Mr. Colbert were willing to testify about their relationship in such a way that would directly implicate them in the shooting.[17]

Finally, the state, relying on Duest v. Dugger, 555 So.2d 849 (Fla. 1990), claims that footnote 37 in Mr. Gunsby's initial brief does not properly raise an issue for appellate review. The state's reliance on Duest is misplaced. See Footnote 7, supra. Footnote 37 in Mr. Gunsby's initial brief provided the "elucidation" required by Duest, and therefore properly raised issues to be considered on appeal.

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[17] The state also accuses Mr. Gunsby of being "disingenuous" for stating that the information that Mr. Latson possessed could have only come from Opal Sellers. State Answer Brief at 62. The state then proceeds to take advantage of an obvious typographical error at page 88 of Mr. Gunsby's initial brief to suggest that Mr. Gunsby admits there was a "connection" between Mr. Latson and Agnes Delores Myers, who also testified about the masked gunmen. There is no evidence in the record of any connection between Mr. Latson and Ms. Myers, and Mr. Gunsby has never admitted any such connection.

B. **Agnes Delores Myers' Testimony.**

The testimony of Agnes Delores Myers is not, as the state suggests, akin to recanted testimony. To the contrary, in the two statements given by Ms. Myers to the police, she adamantly denied having any knowledge regarding the murder of Hesham Awadallah. Ms. Myers placed herself outside of the store at the time of the shooting, and she led police to believe she could not identify the shooters. None of the information provided by Ms. Myers in her police statements is damaging to Mr. Gunsby, and she was not called by the state as a witness at trial. Therefore, Ms. Myers' testimony is not recanted testimony.[18] Ms. Myers specifically testified that she did not come forward earlier because she feared that the real perpetrators of the crime, whom she has identified as James Colbert and Theodore "Uncle Nut

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[18] Henderson v. State, 135 Fla. 85 48, 185 So. 625 (1939) does not stand for the proposition for which it was cited by the state. Armstrong v. State, 642 So.2d 730 (Fla. 1994), also cited by the state, involved a witness who testified at trial and later changed her story and, therefore, is inapplicable to this case. Ms. Myers never testified for or against Mr. Gunsby at trial. To the contrary, Ms. Myers kept information critical to Mr. Gunsby's defense a secret for years because she feared for her safety.

Ms. Myers' testimony is more akin to the affidavits submitted for the defense in McCallum v. State, 559 So.2d 233 (Fla. App. 1990). In McCallum, the defense learned on the day of the defendant's conviction that a witness named Washington had evidence of the defendant's innocence. The defense sought a new trial for appellant based on this newly discovered evidence. The affidavit of Washington submitted by the defense set forth information demonstrating the defendant's innocence. The affidavit also stated that Washington had not come forward previously because he feared that the real perpetrators of the crime would harm him. Id. at 234. The Florida Court of Appeals held that, although the defense may have been able to locate and interview Mr. Washington before the trial, it was clear he would not have testified at that time because he feared for his safety; therefore, his testimony qualified as newly discovered evidence. Id.

Chavers" would harm her. PCT 420. Both men were in prison when she finally came forward. It is clear that through the exercise of "reasonable diligence" this evidence would not have been available to Mr. Gunsby's defense at the time of Mr. Gunsby's trial, and, therefore, it qualifies as newly discovered evidence.

The state also claims that Ms. Myers' testimony is not newly discovered evidence because in one of her original police statements she stated that one of the individuals involved in the shooting "had a hood over his head." However, what the state ignores is the fact that the significance of Ms. Myers' 3.850 testimony had nothing to do with a hood being worn by one of the assailants. Her testimony was that the faces of all three of the assailants were covered by "pantyhose." PCT 403; 405. Her 3.850 testimony is clearly <u>not</u> the same as that set forth in her police statement. PCR 1052-53; 1055.

The state's weak attempt to suggest that the third man described by Ms. Myers <u>could have been</u> Mr. Gunsby is an obvious attempt to direct the attention from the critical thrust of Ms. Myers' testimony, for which it has no explanation. Ms. Myers testified that all three assailants wore "pantyhose" over their heads (PCT 403-405), which wholly undermines the identification testimony of the state's two eyewitnesses.

Finally, the state also makes an unsupported claim that Ms. Myers' version of the shooting is not supported by the physical evidence. State Answer Brief at 64. The state again misstates the evidence in an attempt to support a very weak argument. The state claims that the physical evidence "<u>establishes</u> that the

victim was shot from a distance of less than six feet." State Answer Brief at 64 (emphasis added). However, the actual evidence at trial was that a "precise or accurate" measurement could not be given and, at best, the six feet claimed by the state is only "a general estimate." OGT 329.

Further, the state's version of the physical evidence fails to consider that Ms. Myers testified that the assailants stood in the doorway to fire. PCT 415. Therefore, according to Ms. Myers' testimony, the shotgun itself necessarily had to be two to three feet inside the doorway at the time the fatal shot was fired. In light of the fact that the state's own estimate of the distance from which the shots were fired is, at best, "a general estimate," Ms. Myers' version of the events is as plausible as the state's version.

C. Agnes Bryant's Testimony.

Once again, the state mischaracterizes the statement made by Agnes Delores Myers in her police interview to suggest that her mother's testimony is not newly discovered evidence. Ms. Myers did state in one of her police interviews that she had spoken with her mother after the shooting. However, the state does not provide this Court with the context of that discussion. According to Ms. Myers, she spoke with her mother after the shooting. However, the conversation was not about the shooting, but about allegations that she was involved in selling drugs for Tony Awadallah. PCR 1059.

The standard for newly discovered evidence is that it not be discoverable upon the exercise of "reasonable diligence."

Jackson v. State, supra. There is nothing in either of the police statements given by Agnes Delores Myers that would lead "reasonably diligent" counsel to interview her mother about the shooting.

D. James Colbert's Testimony.

The state argues that the testimony of James Colbert is not newly discovered evidence because his 3.850 hearing testimony about being mistaken about Mr. Gunsby's green army pants was the same as his trial testimony. State Answer Brief at 66. The state, however, misstates Mr. Colbert's trial testimony. Mr. Colbert clearly testified at trial that Mr. Gunsby was wearing "green army pants." OGT 195-196; 204; PCT 992-93.

There was absolutely no physical evidence linking Mr. Gunsby to this crime. The police did not find any clothes in Mr. Gunsby's possession that matched the clothes allegedly worn by the gunman. Mr. Colbert's trial testimony provided the only link. Without that testimony, and in light of all the other evidence discrediting the state's case, Mr. Gunsby would have been acquitted at trial.

X. MR. GUNSBY IS ENTITLED TO A NEW GUILT-INNOCENCE TRIAL BECAUSE OF THE COMBINED EFFECT OF BRADY VIOLATIONS, INEFFECTIVE ASSISTANCE OF COUNSEL, AND NEWLY DISCOVERED EVIDENCE.

The state complains that this cumulative error claim was not presented to the trial court in the 3.850 motion and a claim "cannot be raised for the first time on appeal from the denial of post-conviction relief." State Answer Brief at 68. The state's position is disingenuous. The cumulative error claim was

directly presented to the court in pre-hearing pleadings[19] and in post-hearing pleadings,[20] and it was argued to the court at length during closing arguments.[21] The circuit court was well-aware of Mr. Gunsby's position, as was the state.

Next, the state argues that there is no error to be aggregated in the first place. The state does not explain this argument, and it is not self-evident. The state may mean that, were the Court to find that the state did not improperly withhold evidence, that trial counsel's conduct was not deficient, or that certain items of evidence are not "newly discovered," then these claims cannot be aggregated together. That point is obvious and

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[19] Mr. Gunsby does not contend that every piece of new evidence in his motion, by itself, warrants a reversal of his conviction or a mitigation of his sentence (although some pieces of evidence are that powerful). Mr. Gunsby's position, rather, is that the numerous Brady violations committed by the prosecution and the even more numerous instances of the ineffective performance of Gunsby's defense counsel, taken together with the other injustices cited in the motion, precluded Mr. Gunsby from obtaining a fair hearing at either the guilt/innocence or the penalty phase of his trial.

Movant's Reply Brief at 2, PCR 2692.

[20] Mr. Gunsby's proposed findings of fact and conclusions of law organized the testimony of over 40 witnesses and 100 exhibits from the Rule 3.850 hearing into a long series of Brady violations, instances of ineffective assistance of counsel, and items of newly discovered evidence. The aggregation of these findings and conclusions necessitates a complete retrial."

Defendant's Reply to State's Post-hearing Brief at 2, PCR 3411.

[21] PCR 208-18; 244-46; 300-01.

Mr. Gunsby could not agree more. However, the cases cited in Mr. Gunsby's opening brief support, and due process requires, a cumulative error analysis whereby the questions of whether Brady evidence improperly withheld was material, whether trial counsel's deficient performance was prejudicial, and whether newly discovered evidence is likely to produce an acquittal, must be evaluated in light of the entire record and not in a vacuum. The state provides neither argument nor authority contravening this position.

Third, the state points out that "Gunsby cites no binding precedent which compels the trial court to aggregate all alleged errors, much less to evaluate a Brady claim in light of the other evidence." State Answer Brief at 68. The state, of course, does not even attempt to cite binding precedent to the contrary. Moreover, this Court is bound to ensure that Mr. Gunsby was afforded due process of law, and that function cannot be carried out without looking at the entire record and putting deficiencies in context.

Finally, in contradiction to the state's argument that the cumulative error claim was not raised below, the state contends that "the explicit and implicit findings of the trial court indicate that the court properly assessed the evidence and denied relief." State Answer Brief at 68. As usual, there is no support for this statement, and the Order of the circuit court provides none. From all appearances, the circuit court ignored all guilt/innocent claims but the Brady claim and it evaluated that claim entirely independently. That was a procedural error.

Moreover, even if the trial court did evaluate all the evidence in context, failing to order a new guilt/innocence trial on this record was an abuse of discretion and the trial court should be reversed on this issue.

CONCLUSION

For the reasons identified by the circuit court and for the alternative grounds raised in Mr. Gunsby's briefs, Mr. Gunsby respectfully requests that the circuit court's order granting a new penalty phase proceeding be affirmed. Based on the evidence presented at the 3.850 hearing of Brady violations, instances of ineffective assistance of counsel, and items of newly discovered evidence considered individually and in the aggregate, Mr. Gunsby respectfully requests that he be granted a new trial on guilt/innocence.

Dated this 19th day of October, 1995.

POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.

By ______________________

Bruce A. Peterson Minnesota Bar No. 85637
Admitted Pro Hac Vice
3300 Piper Jaffray Tower
222 So. Ninth St.
Minneapolis, Minnesota 55402
Telephone: (612) 333-4800

Douglas J. Chumbley
4000 International Place
P.O. Box 019101
100 S.E. Second Street
Miami, Florida 33131
Telephone: (305) 530-0055

AND

GREENE ESPEL

John M. Baker   Minnesota Bar No. 174403
Admitted Pro Hac Vice
Metropolitan Centre, Suite 1700
333 South Seventh Street
Minneapolis, Minnesota 55402
(612) 373-0830

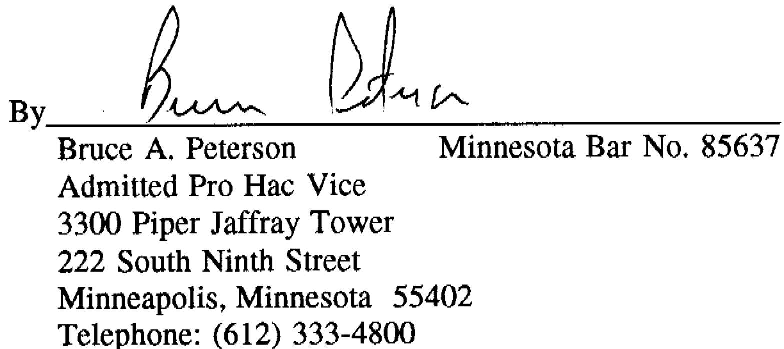
Attorneys for Defendant Donald Gunsby

CERTIFICATE OF SERVICE

I, BRUCE A. PETERSON, HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellee/Cross-Appellant has been furnished by Federal Express on this 19th day of October, 1995, to Kenneth S. Nunnelley, Esq., Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida, 32118.

Dated this 19th day of October, 1995.

POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.



By______________________

Bruce A. Peterson Minnesota Bar No. 85637
Admitted Pro Hac Vice
3300 Piper Jaffray Tower
222 South Ninth Street
Minneapolis, Minnesota 55402
Telephone: (612) 333-4800