IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,056

BRYAN FREDRICK JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Jennings' amended motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. It was originally filed in 1989 and summarily denied. On appeal, this Court remanded for Chapter 119 disclosures. Jennings v. State, 583 So. 2d 316 (Fla. 1991). Following the State's disclosure of additional Chapter 119 materials, the motion to vacate was amended. The circuit court determined an evidentiary hearing was required. After conducting the evidentiary hearing on October 30-31, 1997, the circuit court denied relief.

Citations in this brief shall be as follows: The record on appeal from the 1986 trial shall be referred to as "R. ___" followed by the appropriate page number. (It should be noted that this was the third trial of Mr. Jennings as the first two trials were vacated during the course of the direct appeals). The record on appeal from the 1989 Rule 3.850 proceedings shall be referred to as "PC-R. ___". The record on appeal assembled for the interlocutory appeal which was filed in 1994 but subsequently dismissed by this Court shall be referred to as "IA-R. ___". The record on appeal from the case on remand which includes the transcript of the evidentiary hearing shall be referred to as "PC-R2. ___". The supplemental record on appeal

shall be referred to as "SPC-R2. ___".[1] Other references will be self-explanatory or otherwise explained herein.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

[1]The record from the proceedings following remand has in fact been divided up into three different records: the record from the interlocutory appeal, the record original sent by the clerk's office in the above-entitled matter, and the supplemental record provided after this Court ordered supplementation.

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REPLY TO STATEMENT OF THE CASE AND FACTS

Rule 9.210 of the Florida Rules of Appellate Procedure provides that: "The Answer brief shall be prepared in the same manner as the initial brief, provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." The Statement of the Case and Facts in the Answer Brief is twenty pages long. Nowhere does it clearly specify areas of disagreement with the Statement of the Case contained in the Initial Brief. Instead it makes the conclusory allegation that "[t]he statement of the case and facts contained in Jennings' brief is argumentative, incomplete, and inaccurate." Answer Brief at 1. There is no citation to or explanation of where in the Initial Brief the statement was argumentative, incomplete or inaccurate.

The Statement of the Case and Facts in the Answer Brief contains lengthy quotes from this Court's opinion on direct appeal, the circuit order denying the 1989 motion to vacate, and this Court's opinion in 1991 affirming in part and reversing in part and remanding for further proceedings. Of course, the prior determinations by this Court and the circuit court were made without benefit of the evidence presented in the evidentiary hearing conducted on October 30-31, 1997. The State in the Answer Brief never acknowledges that fact.

Nor does the State acknowledge that subsequent to this Court's opinion in 1991 remanding Mr. Jennings' case for further proceedings, this Court issued its opinion in James v. State, 615

So. 2d 668 (Fla. 1993). In James, this Court held that challenges to the jury instructions regarding the "heinous, atrocious or cruel" aggravating circumstance were cognizible in a Rule 3.850 motion to vacate where the instruction had been objected to at trial and challenged on direct appeal. Similarly, the State does not acknowledge that this Court applied the same standard to challenges to the jury instructions regarding the "cold, calculated and premeditation" aggravating circumstance. See Crump v. State, 654 So. 2d 545 (Fla. 1995).

The Statement of the Case and the Facts in the Answer Brief does not address the proceedings in circuit court between this Court's remand in 1991 and the evidentiary hearing conducted in October of 1997. In circuit court, the State in its written Answer to the Amended Motion to Vacate asserted: "It is the State's position that while the instruction on heinous, atrocious or cruel given in the instant case was unconstitutionally vague and was properly objected to, such error was harmless." (PC-R2. 483). At hearing on Mr. Jennings' motion for summary judgment, the Assistant State Attorney conceded that the merits of the challenge to the instruction on "heinous, atrocious or cruel" aggravator were properly raised and before the circuit court (IA-R. 41, 47). In fact, the Assistant State Attorney specifically stated: " I'm not saying he's not entitled to be heard, but [the issues] can't be decided in a summary fashion." (IA-R. 67). As to the instructions on CCP, the State did not argue either a time bar or a res adjudicata bar. Instead the State argued that the

issue had not been adequately raised on direct appeal (IA-R. 46-47). At the Huff[2] hearing in 1997, the Assistant State Attorney succinctly set forth his position as follows:

> MR. WHITE: As to heinous, atrocious and cruel my research indicates it was preserved and that it was raised properly at trial and it was argued on appeal. As to cold, calculated and premeditated it's been the State's position since they first stated this that is [sic] was not properly preserved and it was not raised and was not argued on appeal.

(PC-R2. 98). These salient facts are ignored by the State in its Answer Brief. There is no discussion in the Answer Brief of the State's concession below that Mr. Jennings was entitled to raise his jury instruction challenges in the Amended Motion to Vacate.

Similarly, the State in its Answer Brief ignores the position of that the State took at the Huff hearing as to the Brady[3] and ineffective assistance of counsel claims. There, the State conceded an evidentiary hearing was warranted as to portions of the Brady claim and suggested an evidentiary hearing on the ineffective assistance of counsel claim (PC-R2. 52, 55, 58, 69, 75, 96, 110). Certainly, the State did not register an objection to the need for an evidentiary hearing as to those matters the circuit court ordered to be heard during the evidentiary hearing. And no cross-appeal was filed challenging the decision to order an evidentiary hearing.

In the Answer Brief, the State does include a six page summary of the evidence presented at the evidentiary hearing in

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[2]Huff v. State, 622 So. 2d 982 (1993).

[3]Brady v. Maryland, 373 U.S. 83 (1963).

October of 1997. Answer Brief at 11-17. The State does not explain what if any specific disagreements it has with the twenty page summary of the evidence which was contained in the Initial Brief. Initial Brief at 27-46. The State's summary of the testimony of Dr. Dee, Annis Music, Patrick Clawson and Raymond Facompre is cursory, leaving out many of the important facts Mr. Jennings' relies upon to establish his claim.[4]

The State also includes a paragraph discussing the testimony of Wayne Porter and a paragraph discussion of the testimony of Michael Hunt. However, Mr. Jennings takes issue with the accuracy of the these two paragraphs. The State completely ignores the fact Mr. Hunt did recall that there was an indication that Sargent Writtenhouse at the Brevard County Jail had contact with Muszynski. (PC-R2. 1163). Mr. Hunt also recalled that Detective Wayne Porter received direction from the State Attorney's Office to go talk to Kruger. (PC-R2. 1164).

Wayne Porter was called as a witness by the State. On cross-examination, Det. Porter recalled that he had been directed by the State Attorney's Office to go talk to Kruger. (PC-R2. 992). The State Attorney's Office knew that Kruger needed to be talked "either through a correctional officer or through a note." (PC-R2. 992). This was an important fact establishing that prior to Det. Porter's interview of Kruger it was somehow known that

[4]The testimony of the witnesses was discussed in the Statement of the Case in the Initial Brief and in the body of the Argument. In the Answer Brief, there is no discussion of these witnesses in the Argument section.

Kruger possessed information regarding Mr. Jennings. Det. Porter knew of Sargent Writtenhouse from the jail; but, could not recall if Sargent Writtenhouse had any contact with either Kruger or Muszynski--"it's certainly possible." (PC-R2. 993). Det. Porter indicated that in the interviews he personally conducted, he interviewed Kruger before Muszynski, but he did not know whether another law enforcement officer had contact with Muszynski before Det. Porter first interviewed Kruger. (PC-R2. 995).

The state's assertion that "[a]ll of the evidence is that Musz[y]nski was the first jail inmate to become known to law enforcement" is quite significant.[5] Answer Brief at 17. In denying 3.850 relief, the circuit court noted "[a]t the third trial, Muszynski testified that Kruger went to the State first." (PC-R2. 776). The circuit court then stated that "all of the credible testimony shows that [Kruger] came forward before Muszynski." (PC-R2. 776). The State thus concedes that circuit court was wrong, "Musz[y]nski was the first jail inmate to become known to law enforcement." Answer Brief at 17.

The State spends nearly three pages discussing the testimony of Vincent Howard, trial counsel for Mr. Jennings at the third trial. The State focuses upon his testimony regarding the guilt phase defense of voluntary intoxication, but generally ignores his testimony regarding presentation of intoxication as mitigation at the penalty phase. The one reference to the

[5]In fact, this was the testimony of Michael Hunt which the State cites to support its representation (PC-R2. 1156).

penalty phase testimony of Mr. Howard is flatly wrong. The State asserts: "Further, he testified that, under the facts of this case, 'voluntary intoxication' was not a strong mitigator." Answer Brief at 14. However, Mr. Howard's testimony was:

> In a case like this one, you're going into that penalty phase with a big strike against you anyway, and the strongest evidence that you can put on any mitigator should be put on, but weak evidence of voluntary intoxication as a mitigating factor, you're really hamstrung if you have a dead child.

(PC-R2. 263). In context, Mr. Howard was explaining his predicament without the Slocum tape, the Annis Music testimony and the Patrick Clawson testimony.[6]

The State in its brief states: "Mr. Howard was never told that Annis Clawson was present when Jennings returned to his home (TR 294)." Answer Brief at 15. The citation is to the State's cross-examination of Mr. Howard as to his recollection of whether anyone (specifically Catherine Music) had told Mr. Howard that Annis Music had seen Mr. Jennings when he returned home. However, Mr. Howard had a note in his file dated March 23, 1986, which indicated that Mr. Jennings had been discussing potential witnesses with Mr. Howard and had directed Mr. Howard as follows: "Annis Music, speak to her" and the word "appearance" with a line drawn to Cathy Music and two telephone numbers. (PC-R2. 1054). Clearly, Mr. Howard (as he acknowledged) was advised of Annis

[6]Mr. Howard was asked whether the Slocum tape and the Annis Music testimony would have provided strong evidence of intoxication at the penalty phase. He responded: "Yes, I think that would constitute strong evidence of intoxication in the penalty phase." (PC-R2. 262).

Music and of the need to talk to her regarding Mr. Jennings' appearance. Yet despite specific instructions from Mr. Jennings to contact Ms. Music, Mr. Howard testified that he failed to contact her and learn what she had to say. (PC-R2. 1054).

The State asserts: "Moreover, Jennings never claimed that he was hallucinating, delusional, or otherwise under the effects of LSD. (TR303)." Answer Brief at 16. The transcript citation does not support the State's representation. Moreover, elsewhere Mr. Howard testified that Mr. Jennings had told the mental health experts that he had taken LSD on the night in question (PC-R2. 263). And in fact, the mental health reports reflected Mr. Jennings' claim to be under the effects of LSD (PC-R2. 265-66).

Mr. Howard testified based upon these reports, he meant to contact an expert on LSD and obtain assistance. However for no reason, Mr. Howard neglected to follow through and make the necessary arrangements. (PC-R2. 1060, 1090-91).

ARGUMENT IN REPLY

INTRODUCTION

The State's Answer Brief displays a pattern of refusing to address authority contrary to the State's position even though the contra authority was set forth in the Initial Brief. As to Argument I, Mr. Jennings relied upon Kyles v. Whitley, 115 S.Ct. 1555 (1995), Lightbourne v. State, 742 So. 2d 238 (Fla. 1999), Young v. State, 739 So. 2d 553 (Fla. 1999), and State v. Gunsby, 670 So. 2d 920 (Fla. 1996), as requiring cumulative consideration of Brady claims and ineffective assistance of counsel claims.

The State does not cite to, let alone address, these decisions in the Answer Brief. In footnote 15, the State asserts without any citation of authority: "There is no rule of law that requires that a claim that has been **rejected** as a basis for relief can somehow become error that must be 'cumulatively' evaluated. Such a theory has no legal basis." Answer Brief at 24 n.15 (emphasis in original). The cases cited by Mr. Jennings in his Initial Brief established more than a legal basis for the argument; those cases not addressed by Appellee established that Mr. Jennings' argument is the law--cumulative consideration is required.

As to Argument II, Mr. Jennings relied upon a series of cases recognizing that a capital post-conviction defendant could raise in a Rule 3.850 motion challenges to jury instructions regarding the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating circumstances where he objected to the instruction as unconstitutional at trial and raised the issue in his direct appeal. The decisions relied upon included: James v. State, 615 So. 2d 668 (Fla. 1993); Jackson v. State, 648 So. 2d 85 (Fla. 1994); Crump v. State, 654 So. 2d 545 (Fla. 1995); Bush v. State, 682 So. 2d 85 (Fla. 1996). The Answer Brief does not cite, let alone address, these decisions. Instead, the State argues "this claim is outside the scope of this Court's order remanding this case, and, further, this Court decided the jury instruction claims adversely to Jennings in his prior collateral attack proceeding when it found them procedurally barred."

Answer Brief at 28.[7]

The State's refusal to address the authority directly contrary to its position which was cited in the Initial Brief must be construed as a tacit admission that those cases cannot be distinguished.

ARGUMENT I

a. Procedural Bar.

In the Answer Brief, Appellee's whole argument is premised upon the notion that Mr. Jennings was precluded on remand from raising those Brady matters previously raised or asserting constitutional ineffective assistance of counsel. For this, Appellee relies upon this Court's remand as limiting what Mr. Jennings could raise to Brady claims premised solely upon 119 materials the State original refused to disclosed, but which were disclosed following this Court's finding of error in the nondisclosure, and the resulting remand. Answer Brief at 11 ("This Court consequently remanded this case to allow the opportunity to file any Brady claims arising from the disclosure of the files at issue. Jennings v. State, 583 So. 2d at 319."). Appellee specifically argues that Mr. Jennings' ineffective assistance claim "is outside the scope of this Court's order remanding the case to the trial court to allow Jennings to plead Brady claims arising from records produced pursuant to Chapter

[7]The State's position also ignores the fact that the State in the circuit court conceded that in light of James it was proper for Mr. Jennings to raise this claim in the amended 3.850. This is discussed in more depth infra.

119." Answer Brief at 17. Subsequently in the Answer Brief, Appellee specifically quotes the following passage from this Court's opinion remanding Mr. Jennings' case for further proceedings:

> Therefore, in accordance with Provenzano v. Dugger [citation omitted], the two-year time limitation of rule 3.850 shall be extended for sixty days from the date of the disclosure **solely for the purpose of providing Jennings with the time to file any new** Brady **claims that may arise from the disclosure of the files.**

Answer Brief at 26-27 (emphasis as provided in the Answer Brief). Appellee then states:

> This Court did not remand this case for the purpose of allowing Jennings to raise **new** claims of ineffective assistance of counsel, nor did this Court remand this case to allow Jennings to relitigate ineffectiveness claims that have already been decided adversely to him. Jennings attempts to do both are outside of the scope of this Court's order remanding this case. Because this is true, the **new** ineffective assistance of counsel claims are time-barred, and the old ineffectiveness claims (which have been previously adjudicated adversely to Jennings) are not subject to relitigation.

Answer Brief at 27 (emphasis in original).

Not only is the State's position erroneous as a matter of law, it was waived when it was not asserted below. First, having quoted this Court's opinion remanding in which this Court specifically relied upon Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), the State should have looked at the subsequent history in the Provenzano case. After the remand there, an amended motion to vacate was filed which included both Brady and ineffective assistance claims. On appeal to this Court, the State advanced the argument advanced here: "The State contends that this claim is procedurally barred, since Provenzano raised

the issue of counsel's ineffectiveness in his prior 3.850 motion." Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993). This Court responded:

> Given the unusual circumstances of this case, we reject this argument. Our remand after Provenzano's initial 3.850 motion was designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested. Provenzano, 561 So. 2d at 549. Given that Provenzano's ineffectiveness claims have arisen as a direct result of the disclosure of the file, we find that they are timely raised.

Provenzano v. State, 616 So. 2d at 430-31.

The circumstances here are identical to those which arose in Provenzano, as this Court acknowledged in relying upon Provenzano when the matter was remanded for 119 disclosures. The result must be the same. Mr. Jennings must be put in the position he would have been put in if the files had been disclosed when requested.[8]

Second, at the Huff hearing the State conceded the need for an evidentiary hearing on both the Brady and ineffective

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[8]Putting Mr. Jennings in the position he would have been in if the State had disclosed the Chapter 119 material when first requested must mean that Mr. Jennings is entitled to the cumulative consideration of all of the allegedly Brady material. In Young v. State, this Court granted 3.850 relief as to the penalty phase proceeding after cumulatively considering the materiality of the documents which had not been disclosed at trial. 739 So. 2d at 561 ("the summary of Brinker's initial statement, read cumulatively with other documents concerning questions about the order of shots fired, is material to Young's sentencing within the meaning of materiality as we have set forth."). Here, the State seeks to deny Mr. Jennings the benefit of cumulative consideration of all of the undisclosed exculpatory evidence as a result of its erroneous withholding of Chapter 119 material back at the time of the 1989 motion to vacate. This clearly violates what this Court said in Provenzano v. State, 616 So. 2d at 430.

assistance of counsel claims. This constituted a waiver of any objection to claims being heard on the merits. Canaday v. State, 620 So. 2d 165, 170 (Fla. 1993)(Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State).

b. Standard of Review.

The State in the Answer Brief argues that the circuit court's resolution of Brady and ineffective assistant of counsel claims following an evidentiary hearing are reviewed deferentially on appeal. Specifically, the State maintains that issue on appeal is whether there is "competent and substantial evidence" to support the circuit court's conclusion. Answer Brief at 20, 27. According to the State, this means was the circuit court's conclusion "an abuse of discretion." Answer Brief at 20.

The State's position was specifically rejected by this Court in Stephens v. State, ___ So. 2d ___ (Fla. Nov. 24, 1999). There, this Court explained that under the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), "both the performance and prejudice prongs are mixed question of law and fact." Stephens, slip op at 10. As a result, "alleged ineffective assistance of counsel claim[s are] mixed question[s] of law and fact, subject to plenary review." Stephens, slip op. at 7. See Lusk v. Dugger, 890 F. 2d 332, 336 (11th Cir. 1990). Further, this Court stated: "The second prong of the ineffective assistance of counsel test focuses on the reliability of the

proceeding and has never been subject to an abuse of discretion standard of review." Stephens, slip op. at 11.

If this is true of the standard of appellate review for an ineffective assistance of counsel claim, it is equality true of the standard of review of a Brady claim. In United States v. Bagley, 473 U.S. 667 (1985), the United States Supreme Court adopted the Strickland prejudice prong standard as the standard to review the materiality prong of a Brady claim. Bagley, 473 U.S. at 682. See Duest v. Singletary, 967 F. 2d 472, 478 (11th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940, adhered to on remand, 997 F.2d 1326 (1993)("This issue presents a mixed question of law, reviewable de novo.").

The State's arguments in the Answer Brief are thus premised upon the application of the wrong standard of review, i.e. the abuse of discretion standard.

c. Cumulative Analysis.

The State in its Answer Brief argues "This Court has already affirmed the resolution of the claim concerning the Slocum tape, and Jennings cannot relitigate that claim in this proceeding." Answer Brief at 24. Similarly, the State argues that the claim that Mr. Jennings was not provided with a letter from Muszynski to the State Attorney "is not available to Jennings because it has previously been rejected by this Court." Answer Brief at 24. However, the State's position is directly contrary to this Court's holding in Lightbourne v. State, as well as Provenzano v. State.

This Court in Lightbourne v. State, 742 So. 2d at 249 held that a cumulative analysis of Mr. Lightbourne's Brady claim and his newly discovered evidence was required. This was true even thought this Court noted that Mr. Lightbourne had first presented a Brady claim years before. See Lightbourne v. Dugger, 549 So. 2d 1364, 1367 (Fla. 1989). In fact in Lightbourne, the Brady claim presented in 1989 was "based on the State's failure to disclose that police had engaged in a scheme with Chavers and Carson to elicit incriminating statements from Lightbourne." 742 So. 2d at 242. The Brady claim presented in 1994 was supported by evidence not previously available ("the State committed a Brady violation in withholding evidence that Chavers' and Carson's testimony was false and elicited in violation of Henry". 742 So. 2d at 247). This Court's decision in Lightbourne is certainly a repudiation of the State's argument here. Where new evidence of Brady violations which was previously unavailable is now available, the entirety of the Brady claim must be considered in order to determine whether cumulative consideration warrants 3.850 relief.[9]

Similarly, this Court's reasoning in Provenzano v. State leads to the same conclusion. There, this Court held where the State erroneously withholds Chapter 119 records which give rise to claim of constitutional error, once those records are disclosed the capital post-conviction litigant must be put back

[9]Again, this is particularly appropriate where as here the evidence was not available in the prior proceeding because the State wrongfully withheld it.

in the position in he would have been in had the records been disclosed when first requested. Had the 119 records disclosed here on remand been disclosed when requested in 1989, Mr. Jennings would have been entitled to cumulative consideration of his claims. State v. Gunsby, 670 So. 2d at 923-24. The State is not entitled to profit from its wrongful withholding of public records.

The State argues that no cumulative consideration was required because of its recognition that no cumulative analysis was conducted by the circuit court. See Answer Brief at 24 ("there [was] no 'cumulative error' to consider"). However, this Court has already held in similar circumstances that the failure to conduct a cumulative analysis is reversible error. Lightbourne.[10]

d. Brady and ineffective assistance claims.

1. mutually exclusive claims.

The State asserts that "Brady and ineffective assistance of counsel claims are mutually exclusive, at least in this case. Jennings should elect which theory he wants to use, instead of trying to litigate his claims with alternative, mutually

[10]This Court remanded for further proceedings in Lightbourne because the error involved the refusal to allow the presentation of the evidence needed to be considered cumulatively. Here, a remand may not be necessary because the Slocum tape and the Muszynski letter are in evidence, along with the testimony of the necessary witnesses. As explained in the standard of review discussion, supra, this Court must conduct a de novo review which clearly will demonstrate confidence is undermined in the reliability of the outcome of Mr. Jennings' penalty phase proceeding.

exclusive, theories." Answer Brief at 19 n.13. The State's position has previously been rejected by this Court. Provenzano v. State, 616 So. 2d at 430; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); State v. Gunsby, 670 So. 2d at 924. Where collateral counsel discovers exculpatory evidence which did not reach the jury, but which was in the State's possession pretrial, he should not be forced to guess whether the courts will credit the prosecutor's insistence the evidence was made available to trial counsel or trial counsel's insistence that the prosecutor failed to provide him the evidence in question. This Court has already determined that in such circumstances it is proper to plead Brady and ineffective assistance claims in the alternative.

2. Brady.

The only aspect of Mr. Jennings' Brady claim which is discussed on the merits in the Answer Brief relates to the undisclosed notes of Michael Hunt summarizing the content of statements made to him by "witness Kruger." Answer Brief at 19. The State's only argument as to this is to quote the circuit court's order and to assert that the circuit court's conclusions did not constitute "an abuse of discretion." Answer Brief at 20.

Of course what the State completely glosses over[11] is: 1) the fact that the circuit court accepted as fact that the notes summarizing statements made witnesses to Michael Hunt were not

[11]This is besides the circuit court's failure to conduct a cumulative analysis of all the exculpatory evidence which did not reach the jury because either the State failed to disclose or defense counsel failed to discover.

disclosed to trial counsel[12]; and 2) the part of the order printed in bold in the State' Answer Brief ("The fact remains that Kruger came forward voluntarily, and all of the credible testimony shows that he came forward before Muszynski.") is directly contrary to the representation in the State's Statement of the Case ("All of the evidence is that Muszynski was the first jail inmate to become known to law enforcement" Answer Brief at 17). This is significant because at Mr. Jennings' trial Muszynski testified that Kruger went to the State first ("Q. Did [Kruger] go to the State first or did you? A. He did." R. 679).

At the evidentiary hearing below, the State called Michael Hunt and elicited the following testimony:

> Q. Now the first thing I direct your attention to, and I'm not sure where it is on the page, but at some point in there it make[s] a reference to Mr. Kruger coming to light after Clarence Musz[y]nski, and he might be referred to "C.M." I'm not sure. Do you see that somewhere?
>
> A. Yes, it's on the second page.
>
> Q. What is the exact phrase in that note?
>
> A. It is in parenthesis, it says, "Note, W. came to light after Rick M-U-S period, told B.C.S.D. of his presence["], end parenthesis.
>
> * * *
>
> Q. All right. What's you[r] recollection based on the

[12]In Young v. State, 739 So. 2d 553 (Fla. 1999), this Court found a Brady violation on the basis of the prosecutor's notes of witness interviews. Thus, there can be no question that the notes here gave rise to a valid Brady claim since it was uncontested that the notes were not disclosed to Mr. Jennings' trial counsel.

> reports and statements of the witnesses as to whether it was Mr. Kruger or whether it was Mr. Musz[y]nski who first contacted the police in order of time?
>
> A. Between the two of them, Mr. Musz[y]nski and Mr. Kruger?
>
> Q. Right.
>
> A. I believe it was Mr. Musz[y]nski, but I'm not positive.

(PC-R2. 1153, 1155-56). Thus, the note contradicted Muszynski's testimony of Mr. Jennings' trial.

On cross-examination, Mr. Hunt remembered that a Sargent Writtenhouse at the jail "had contact with Mr. Musz[y]nski." (PC-R2. 1163). Mr. Hunt recalled the reference to Sargent Writtenhouse in Muszynski's deposition. (PC-R2. 1163). Mr. Hunt also remembered that "Wayne Porter receive[d] direction from the State Attorney's Office to go talk to Mr. Kruger." (PC-R2. 1164). Similarly, Wayne Porter testified on cross-examination by Mr. Jennings' collateral counsel that he had been directed by the State Attorney's Office to go talk to Kruger (PC-R2. 992). The State Attorney's Office knew that Kruger needed to be talked to "either through a correctional officer or through a note." (PC-R2. 992). Det. Porter knew of Sargent Writtenhouse from the jail; but, could not recall if Sargent Writtenhouse had any contact with either Kruger or Muszynski–"it's certainly possible." (PC-R2. 993). Det. Porter did not know whether another law enforcement officer had contact with Muszynski before Det. Porter first interviewed Kruger. (PC-R2. 995).

Thus, the circuit court's order is directly contradicted by

all of the evidence as the State implicitly acknowledged in its Statement of the Case ("All of the evidence is that Muszynski was the first jail inmate to become known to law enforcement. Answer Brief at 17).[13]

Besides the circuit court's conclusion being patently wrong as the record of the evidentiary hearing shows, the issue concerns whether the note in the State's possession which directly contradicted Muszynski's testimony at trial, along with other undisclosed exculpatory evidence undermines confidence in the outcome cumulatively.[14] The circuit court did not conduct

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[13]Oddly the next sentence in the Answer Brief is: "Mr. Hunt's note that suggests the opposite is erroneous." Answer Brief at 17. In fact, the note does not suggest the opposite; it is consistent with Mr. Hunt's testimony. The citation given for this sentence is to the page in the transcript where after Mr. Hunt gave an unclear answer as to the basis for the information in the note, an objection was registered regarding the source of his response (memory or hearsay), and the following occurred:

> THE COURT: I think your objection is well taken. The question was, were you able to figure out any justification for that note, and your answer was, no, correct?
>
> THE WITNESS: That's correct.

(PC-R2. 334). Subsequently in cross-examination, Mr. Hunt was reminded of Sargent Writtenhouse.

[14]The United States Supreme Court explained in Kyles:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

this analysis, nor does the State conduct this analysis in the Answer Brief. The significance of the evidence in the State's possession at the time of trial directly contradicting Muszynski's testimony is enhanced when cumulatively evaluated with Muszynski's letter seeking consideration in return for his testimony. And its significance must be further evaluated in light of the State concession in the 3.850 proceedings below that there were "conflicting statements as to whether or not in fact [the victim] was conscious during the entire episode." (IA-R. 27). According to the State, the question of whether the victim was conscious "depends on which version of those facts you believe." (IA-R. 28). Cumulative consideration requires consideration of the evidence disclosed in 119 materials that Crisco would have contradicted Muszynski's testimony had he been asked whether the victim was unconscious throughout the episode. Cumulative consideration of the Slocum tape must also occur because the level of intoxication described therein is inconsistent with Mr. Jennings' actions as related by Muszynski. Cumulative consideration of Annis Music's description of Mr. Jennings' appearance similarly impeaches Muszynski' version of events. The basis of the two of three aggravating circumstances was the embellished story told by Muszynski. The wealth of impeaching evidence now available which was not presented at trial must undermine confidence in the reliability of the

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115 S. Ct. at 1573 n. 19 (citation omitted)(emphasis added). Thus, the issue is what affect the information contained in the note may have had upon Mr. Jennings' jury.

outcome.[15]

3. ineffective assistance.

The State's primary argument regarding Mr. Jennings' ineffective assistance of counsel claim is that it was procedurally barred, even though such argument was not advanced below and the State agreed to an evidentiary hearing regarding the claim. As explained supra, the State's argument must be rejected.

As to the merits, the State's argument in its entirey is:

> To the extent that further discussion of the ineffective assistance of counsel component of this claim is necessary, the Rule 3.850 trial court decided the "cumulative error" ineffectiveness claim adversely to Jennings based upon the record and the evidence. (TR786). That finding is supported by competent substantial evidence, and should be affirmed in all respects.

(Answer Brief).

The circuit court's findings regarding the ineffectiveness of counsel claim in its entirety was as follows:

> The final claim is that counsel was ineffective based upon the cumulative errors alleged. Having reviewed the entire record, heard argument of counsel, heard the testimony of witnesses, reviewed evidence presented, and reviewed final written arguments, the Court finds that defense counsel rendered competent and effective counsel to this defendant.

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[15]This argument was discussed in more detail in the Initial Brief. Mr. Jennings does not waive the more detailed discussion and explanation by not repeating it in full here. Instead, he would simply note that the State's failure to address or respond to the cumulative analysis (beyond the erroneous contention that a cumulative analysis is not required) should be construed as a concession by the State that cumulative consideration does as a matter of law undermine confidence in the reliability of the death sentence.

(PC-R2. 786).

The circuit court's order is to be reviewed de novo. Stephens v. State. It contains absolutely no purported factual determinations as to the ineffectiveness claim. The State's argument that deference is required is wrong.

The State makes no effort to refute the arguments of ineffectiveness set forth in the Initial Brief. Mr. Jennings' trial counsel failed to contact Annis Music despite the fact that Mr. Jennings asked his lawyer to talk to her about Mr. Jennings' appearance. Patrick Clawson was not called as a witness because of trial counsel's mistakenly believed that Clawson was not available. Trial counsel failed to obtain the services of a drug expert despite noting the need to obtain such an expert. Trial counsel failed to present testimony from Billy Crisco that according to his account of Mr. Jennings' alleged statement, the victim was rendered immediately unconscious and remained so until her death. Trial counsel failed to elicit testimony from Catherine Music, a witness he did call, describing Mr. Jennings' appearance shortly after the time of the homicide as "kind of wild looking" and "under the influence of something." Trial counsel failed to learn of, present and impeach Allen Kruger with information in Kruger's own court file showing that less than two months before Mr. Jennings purportedly made a statement to him, Kruger's counsel challenged Kruger's competency on grounds of his "delusional thought patterns." Trial counsel also failed to call Floyd Canada, another witness to Mr. Jennings' extreme

intoxication.

Mr. Jennings continues to rely upon the arguments contained in the Initial Brief in more detail, noting simply that the State failure to address the ineffectiveness arguments must be construed as a tacit concession that those arguments cannot be refuted.[16]

ARGUMENT II

Besides arguing that the challenge to the HAC and CCP jury instruction is procedurally barred,[17] the State argues that the circuit court's harmless error analysis is "supported by competent substantial evidence, and should be affirmed in all respects." Answer Brief at 28. However, this is not the standard of review applicable to harmless error determination made by a circuit court. The issue of harmlessness of constitutional error is a legal one subject to de novo review. See Richmond v. Lewis, 506 U.S. 40 (1992).

Further, the State argues that this Court's determination that there was sufficient evidence on direct appeal to support the sentencing court's finding of HAC and CCP establishes the harmlessness of the instructional error. Answer Brief at 29 ("this Court's direct appeal decision is dispositive."). Of course, this argument is not the law. If it were, this Court

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[16]Certainly, the State had ample space remaining in its brief to address the merits of the ineffectiveness claim had it disagreed with the analysis of the merits contained in the Initial Brief.

[17]Mr. Jennings addressed this aspect of the State's argument in the Introduction section of the Argument in Reply, supra.

would not have granted relief in Hitchcock v. State, 614 So. 2d 483 (Fla. 1993). In Hitchcock, this Court had found sufficient evidence to support the HAC aggravator on direct appeal. Yet, this Court subsequently did not find instructional error harmless.

In fact, this Court has clearly enunciated the standard for determining whether the instructional error present here was harmless. In Walls v. State, 641 So. 2d 381, 387 (Fla. 1994), this Court made clear that the State bore the burden of proving the error harmless beyond a reasonable doubt in accord with the harmless error test of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In DiGuilio, this Court stated:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Diguilio, 491 So. 2d at 1139.

Here, the State makes no effort to carry its heavy burden. It simply and erroneously argues: 1)that this Court must give deference to the circuit court's ruling, and 2)that this Court finding of sufficient evidence on direct appeal resolved the matter. There is no discussion of the evidence in the record that could have lead a properly instructed jury to conclude that

neither HAC nor CCP were established beyond a reasonable doubt.[18] The State's failure to discuss this evidence is telling. A resentencing is required.

ARGUMENT V

This Court has recognized that as new facts have developed regarding Florida's electric chair which raised questions about whether it constituted cruel and/or unusual punishment, capital post-conviction were entitled to raise the merits of the question in post-conviction proceedings.

Now, the legislature has changed the law regarding the method of executing a condemned prisoner. On January 14, 2000, Governor Bush signed into law modifications to Section 922.10, Florida Statutes, which in essence made "lethal injection" the method unless the condemned choices electrocution.

Under the savings clause of the Florida Constitution, the new legislation does not and cannot be applied to Mr. Jennings. Article X, section 9 of the Florida Constitution provides, "Repeal or amendment of a criminal statute shall not affect

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[18]Some of this evidence is in the trial record. For example, the State's mental health expert, Dr. Podnos, testified that the offense "started as an impulse" (R. 1513). Also, the State conceded in circuit court that the evidence at trial was in conflict as to whether the victim was unconscious (IA-R. 27).

Additional evidence was developed in the post-conviction proceedings. For example, the Slocum tape describes Mr. Jennings' inebriated condition which was inconsistent with a pre-existing plan. Annis Music's testimony describes Mr. Jennings' inebriated condition and his effort to get a ride home which was inconsistent with a pre-existing plan. Additionally, there is evidence impeaching Muszynski's testimony which provided the basis for the finding of HAC and CCP and which was in conflict with what Crisco reported.

prosecution or punishment for any crime previously committed." This Court has held that legislation changing the method of execution is a "criminal statute" which cannot be applied to cases where the crime occurred prior to the change. Washington v. Dowling, 92 Fla. 601, 109 So. 588 (1926)(under Art. 3, § 32, Fla. Const., predecessor to current savings clause, person sentenced to death under statute that made hanging the method of execution could not be executed by electrocution because statute providing for electrocution went into effect after crime). See Washington, 109 So. at 593 (Brown, J., concurring)("the savings clause [ ] of the Constitution would operate to prevent such amendatory statute from affecting the prosecution or punishment of the crime of murder committed before such amendatory statute was adopted."). This Court has repeatedly held that statutes altering how punishments are inflicted, if enacted after the crime occurred, cannot be applied to the defendant. Ex parte Browne, 93 Fla. 332, 111 So. 518 (Fla. 1927) (savings clause of Florida Constitution prohibited application of statute providing that "on or after January 1,A.D. 1924, death by hanging as a means of punishment for crime in Florida is hereby abolished and electrocution, or death by electricity substituted therefor" to person who committed crime before statute was enacted); Castle v. State, 330 So.2d 10 (Fla. 1976)(defendant was not to be sentenced in conformity with an amendment to criminal statute adopted after the date of the offense); Pizarro v. State, 383 So. 2d 762 (Fla. 4th DCA 1980)(on rehearing)(trial court was precluded from

imposing sentence under an act that did not exist when the crime occurred). Accord Bradley v. State, 385 So. 2d 1122, 1123 (Fla. 1st DCA), review denied, 392 So. 2d 1372 (Fla. 1980).

The longstanding rule that an amendment to a criminal statute cannot be applied to a prosecution and/or punishment arising from a crime committed before the amendment's adoption provided Mr. Jennings a substantive due process right. See Ford v. Wainwright, 477 U.S. 399, 428 (1986)(O'Connor, J., concurring)("Our cases leave no doubt that where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause.").

The legislative staff analysis of the lethal injection bill mentions Washington v. Dowling and notes that the "savings clause issue may still be a cognizable issue with respect to retroactive application of lethal injection." Senate Staff Analysis at 6. The staff analysis also notes that the bill purports to deal with this problem by indicating the legislature's desire that the change be applied retroactively. Ibid.

Where Florida has long established a right not to be subjected to retroactive penal statutes, as in Washington v. Dowling, a retroactive change by judicial interpretation would violate both ex post facto and due process. Bouie v. City of Columbia, 378 U.S. 347, 353 (1964)("an unforeseeable judicial enlargement of a criminal statute, applied retroactively,

operates precisely like an ex post facto law"). This Court has recently applied Bouie in making its interpretation of a criminal statute prospective only. State v. Snyder, 673 So. 2d 9 (Fla. 1996). Further, despite the legislature's desire that the lethal injection law apply retroactively, the legislature is not empowered to amend Florida's Constitution, but only to propose amendments which are then submitted to the electorate. Fla. Const., Art. XI, Sections 1, 5. See Provenzano v. Moore, 744 So.2d 423, 419 (Fla. 1999)(Wells and Quince, JJ., concurring)("change to lethal injection *may be* legally attainable" but "legal issue in article X, section 9," Florida Constitution, "requires full study and awareness by the legislature of the legal issues") (emphasis added). Accordingly, application of the lethal injection statute to Mr. Jennings violates the savings clause of the Florida Constitution. Any attempt to retroactively change the savings clause or the judicial construction of the savings clause violates due process. Therefore, the new legislation cannont be applied to Mr. Jennings.

However, the new legislation establishes more evidence of a national consensus against the electric chair. In Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989), the United States Supreme Court while considering whether the Eighth Amendment precluded the execution of the mentally retarded explained:

> The prohibition against cruel and unusual punishments also recognizes the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958)(plurality opinion);

> Ford [v. Wainwright, 477 U.S. 399,] 406 [(1986)]. In discerning those "evolving standards," we have looked to objective evidence of how our society views a particular punishment today. See Coker v. Georgia, [433 U.S. 584,] 593-597 [(1977)]; Enmund v. Florida, 458 U.S. 782 (1982). The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.

In Penry, the Court concluded "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." 492 U.S. at 335. However in light of the legislative determination to only use the electric chair in Florida where there is an affirmative election of the electric chair as the method of execution, the electric chair must be declared unconstitutional. Now only three states remain committed to the use of the electric chair as the method of execution. There is a national consensus against the electric chair, and this Court should so hold.

CONCLUSION

Mr. Jennings' conviction and sentence of death were the product of numerous constitutional errors. The State violated its obligation under Brady. Trial counsel rendered constitutionally deficient performance. The jury received constitutionally defective instructions regarding two aggravating factors over defense counsel's objection. This errors alone were prejudicial to Mr. Jennings. However, these errors did not happen alone; they happened in conjunction with each other,

thereby magnifying the prejudicial impact that each had on Mr. Jennings' case. The instructional errors were not harmless beyond a reasonable doubt. The Brady violations and trial counsel's deficient performance certainly when considered cumulatively established that Mr. Jennings did not have the benefit of a reliable adversarial testing. At a minimum, a new penalty phase proceeding must be ordered.

Finally, Mr. Jennings' sentence by electrocution constitutes cruel and/or unusual punishment, and is thus, unconstitutional.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished to all counsel of record by United States Mail, first class postage prepaid, on February 16, 2000.

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