IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-48

WILLIAM GREG THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a successive motion to vacate that had been filed on the basis of newly discovered evidence.

Citations to Thomas's record on appeal in his direct appeal will be designated as "R --";

Citations to the record on appeal from the denial of post conviction relief in 2001 will be as "PCR --";

Citations to the record on appeal from the denial of a prior successive motion to vacate will be as "PCR2 --";

Citations to the current record on appeal from the denial of the successive motion to vacate at issue in this appeal will be as "PCR3 --".

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INTRODUCTION TO REPLY BRIEF

There is much that is wrong with the State's Answer Brief. For starters, while indicating that the standard of review before this Court is de novo, the State makes no reference to the longstanding requirement that, in appeals from the denial of a Rule 3.851 motion, the defendant's factual allegations must be accepted as true. *Valle v. State*, 705 So. 2d 1331, 1333 (Fla. 1997); *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). The factual allegations must be accepted as true even if the Rule 3.851 motion is a successive motion. *Mungin v. State*, 79 So. 3d 726, 733 (Fla. 2011);[1] *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989).[2]

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[1]In *Mungin v. State*, this Court accepted the factual allegations in a successive motion as true when considering Mungin's claims "that he [was] entitled to relief under *Brady*, *Giglio*, or newly discovered evidence." 79 So. 3d at 733. This Court concluded that as to "the *Brady* claim presented, accepting all allegations in the motion as true to the extent they are not conclusively refuted by the record, we cannot agree that the record at this point conclusively shows that the evidence was not material." *Mungin v. State*, 79 So. 3d at 737. Turning to the *Giglio* claim, this Court also found that an evidentiary hearing was necessary. *Id.* at 738 ("after reviewing the *Giglio* claim presented and accepting all allegations in the motion as true to the extent they are not conclusively refuted by the record"). However, this Court did not order an evidentiary hearing on the newly discovered evidence claim because of the higher burden of proof that such a claim carried. *Id.*

[2]In *Lightbourne v. Dugger*, this Court accepted the factual allegations in a successive motion as true and ordered an evidentiary hearing on Lightbourne's allegation "that the state deliberately used false and misleading testimony and intentionally withheld material exculpatory evidence." 549 So. 2d at 1365. Lightbourne alleged that his

In the Statement of the Case and Facts set out in the Answer Brief, Mr. Thomas' factual allegations are not only not accepted as true, the factual allegations are not referenced. All that is said about Mr. Thomas' Rule 3.851 motion is that "Appellant filed a successive post-conviction motion alleging Newly Discovered Evidence (Motion), which is the basis for the appeal." (AB at 6).[3]

In the Summary of the Argument, the State references Mr. Thomas' 3.851 claim as a newly discovered evidence claim. The State says its argument is that "Appellant failed to satisfy the test for newly discovered evidence." (AB at 6).

Brady and *Giglio* claims were not procedurally barred because the evidence of the State's misconduct was withheld. This Court explained that accepting the factual allegations as true as to due diligence required the circuit court to conduct an evidentiary hearing. *Lightbourne v. Dugger*, 549 So. 2d at 1365 ("the allegations of his current motion sufficiently demonstrate that 'the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence' contemplated by the exception to the time limits of rule 3.850.").

[3]The State's description of the motion as "alleging Newly Discover Evidence" in the context of the rest of the Answer Brief is misleading in suggesting that Mr. Thomas has presented a newly discovered evidence claim under *Jones v. State*, 591 So. 2d 911 (1991). The motion was captioned "Successive Motion to Vacate and Set Aside Judgment and Sentence Based on Newly Discovered Evidence" (PCR3 1). However, the newly discovered evidence referenced in the caption was previously unavailable evidence that demonstrated that "[t]he State's failure to correct the materially inaccurate testimony violated Mr. Thomas's due process rights under *Mooney v. Holohan*, 294 U.S. 103 (1935); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Banks v. Dretke*, 540 U.S. 668 (2004), as well as his Eighth Amendment right under *Johnson v. Mississippi*, 486 U.S. 578 (1988)." (PCR3 22).

However, Mr. Thomas has not presented a newly discovered claim under *Jones v. State*, 591 So. 2d 911 (1991), to this Court. In his Initial Brief, Mr. Thomas did not cite *Jones v. State* or its progeny regarding a "newly discovered evidence claim." *See Hildwin v. State*, 141 So. 3d 1178, 1185 (Fla. 2014).[4]

In the Argument section of the Answer Brief, the State begins with a discussion of the standard for reviewing newly discovered claims as set forth in *Spann v. State*, 91 So. 3d 812 (Fla. 2012).[5] However, Mr. Thomas has not presented a recantation claim or a newly discovered claim under *Jones v. State* and its progeny. While the State eventually does reference the fact that Mr. Thomas has presented *Brady* and *Giglio* claims in its Argument section, it fails to discuss or reference Mr. Thomas' factual allegations, and certainly does not accept the factual allegations as true. To make matters worse, the State addresses the *Brady* and *Giglio* claims in an inverse order, taking up the claims in a manner that seeks to bury the most egregious

[4]Mr. Thomas cites here *Hildwin v. State*, not because it is relevant to the *Giglio* and *Brady* claims that he is presenting to this Court, but to demonstrate the difference between a newly discovered evidence claim under *Jones v. State* and new evidence of *Giglio* and *Brady* violations that was not previously available.

[5]At issue in *Spann* was the recantation of a witness called by the State at Spann's capital trial. There was no *Giglio* or *Brady* claim at issue. Moreover, unlike here, the circuit court conducted an evidentiary hearing on the newly discovered evidence claim premised on *Jones v. State* and its progeny.

prosecutorial misconduct.[6]

The bombshell information regarding Adrian Cason is addressed last and only as a *Brady* claim. The State totally ignores the fact that the prosecutor's testimony in Cason's 3.850 hearing in 2000 demonstrates that the prosecutor did not tell the judge the truth when he was asked if Cason was going to be a witness. The judge inquired in order to ascertain whether the public defender had to be removed due to a conflict. Nor did the prosecutor correct Cason's false and/or misleading deposition testimony. The fact that Cason's plea deal was solely based on his assistance in gathering evidence against Mr. Thomas was never revealed.

By ignoring the actual factual allegations, the testimony at the Cason 3.850 evidentiary hearing, the deliberate obfuscation, the State **does not address Mr. Thomas' claim that his Sixth Amendment rights under *United States v. Henry*, 447 U.S. 264 (1980), and *Massiah v. United States*, 377 U.S. 201 (1964), were**

[6]Indeed, *Giglio* does not appear in the State's Table of Authorities. It is actually only referenced on pages 18 and 19 of the Answer Brief. And, there is no acknowledgment that the State's deliberate obfuscation through false or misleading evidence which is left uncorrected, or false or misleading argument to a judge or a jury, or deliberate sandbagging of defense counsel requires a reversal unless the State proves the error harmless beyond a reasonable doubt. *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011); *Johnson v. State*, 44 So. 3d at 67 ("the State has failed to show that Pickard's knowing use of false testimony and misleading argument at the 1981 suppression hearing was immaterial, i.e., that it was harmless beyond a reasonable doubt.").

violated and that the State hid that Sixth Amendment violation from him.

Nowhere in the Answer Brief does the State address *Banks v. Dretke,* 540 U.S. 668 (2004); *Johnson v. State*, 44 So. 3d 51 (Fla. 2010); or *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012). These three cases establish that Mr. Thomas was diligent as a matter of law because the State hid the evidence of the *Henry*, *Massiah*, *Giglio* and *Brady* violations. Nowhere in the Answer Brief is *Johnson v. Mississippi*, 486 U.S. 578 (1988) addressed.

Consideration must be given to the State's refusal to address Mr. Thomas' factual allegations and accept them as true, address the actual claims raised by Mr. Thomas, and/or address the case law on which his arguments were based in his Initial Brief.

REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

The State's Statement of the Case and Facts fails to address the factual allegations that Mr. Thomas has made and that are at issue in this appeal. Like an ostrich burying its head in the sand, the State hides from the factual allegations which by this Court's case law must be accepted as true in an appeal from the summary denial of a 3.851 motion.

Mr. Thomas' prosecutor, George Bateh, gave sworn testimony in 2000 at an evidentiary hearing on a 3.850 motion filed by Adrian Cason. There, he revealed that he agreed to allow Cason to avoid a death sentence when Cason, through his attorney, offered to help the State in building its case against Mr. Thomas. The deal that was worked out only concerned assistance in the prosecution of Mr. Thomas.[7] Mr. Bateh specifically testified that due to the heinous nature of the murder that Cason had committed, he never had any intention of presenting him as a witness at Mr. Thomas' trial. This establishes that Mr. Bateh was not truthful in open court in Mr. Thomas' case when the judge asked him if Cason was going to be a witness against Mr. Thomas.[8]

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[7]No mention of assistance in the prosecution of Mr. Thomas was mentioned in the formal plea agreement that the State filed in Cason's case.

[8]It also shows that the language in the plea agreement that Cason would be required

Mr. Bateh's testimony at the 2000 evidentiary hearing on Cason's 3.850 motion was heard by Judge Lance Day, who had assisted Mr. Bateh as a prosecutor when they prosecuted Mr. Thomas. Several months after hearing Mr. Bateh's testimony in Cason's case, Judge Day was called at an evidentiary hearing on Mr. Thomas' 3.51 motion. Judge Day testified that he was unaware of any *Brady* material having been withheld from Mr. Thomas and/or his counsel. The transcript of the Cason evidentiary hearing demonstrates that Judge Day's testimony in 2001 at Mr. Thomas' evidentiary hearing was not accurate. Undisclosed information that would have been favorable to Mr. Thomas permeated the 2000 evidentiary hearing in Cason's case.

Finally, nowhere does the State address in its Statement of the Case and Facts where it honored its duty under *Banks v. Dretke* to disclose favorable information and/or reveal its presentation or reliance on false or misleading evidence, its use of false or misleading argument, or its deliberation obfuscation of the truth in order to sandbag Mr. Thomas or his counsel.

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to testify truthfully when subpoenaed by the State in other criminal case was smoke hiding the fact that Mr. Bateh knew from the beginning that he would never be calling Cason to testify on behalf of the State because Cason would have no credibility due to the heinous murder he had committed.

ARGUMENT IN REPLY

Generally, the Answer Brief's Argument section does not address the arguments made by Mr. Thomas and the case law he relied upon in his Initial Brief. Since the State has chosen to not address the actual claims and arguments that Mr. Thomas presented in his Initial Brief, he is generally in the position of being able to continue to rely on what has not seriously been addressed or challenged.

However, there are couple of points to be made. The State does not address Mr. Thomas' reliance on *Banks v. Dretke* as demonstrating that as a matter of constitutional law, he exercised due diligence. In *Banks,* the United States Supreme Court explained that a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."[9] *Id*. at 696. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id*. The Supreme Court explained: "**Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such**

[9]In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court explained: "To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."

material has been disclosed." *Id*. at 695 (emphasis added).

Instead of addressing *Banks*, the State relies upon old case law from this Court, like *James v. State*, 453 So. 2d 786, 790 (Fla. 1984). Prior to *Banks*, this Court had imposed a duty of diligence on defendants. For example, in *Hegwood v. State*, 575 So. 2d 170, 172 (1991), this Court applied a four-prong test for *Brady* claims that included the requirement "that the defendant d[id] not possess the evidence nor could he [have] obtained it himself with any reasonable diligence." However, after *Banks*, this Court dropped that prong. Thereafter, this Court in accord with *Banks* applied a three-prong test. *Occhicone v. State*, 768 So. 2d 1037, 1041 (Fla. 2000).

Thus, the question is now whether the defendant was entitled to rely on the State's representations that it had not withheld favorable information and/or presenting uncorrected false or misleading evidence and/or false or misleading argument or otherwise sandbagged the defense.

Moreover, this Court has found due diligence exercised even when the necessary documentation to establish a claim had been provided by the State. In *Waterhouse v. State*, 82 So. 3d at 104, the defense was provided a police report with the name of a witness who later revealed that the report misrepresented his statement to the police. However, due diligence did not require either trial counsel or collateral

counsel to contact every witness listed in all the police reports to verify the reports accuracy. *Id*. ("requiring collateral counsel to verify every detail and contact every witness in a police report—even where the police report indicates that the witness has no useful information—would place an equally onerous burden on collateral counsel, with little chance of discovering helpful or useful information."). In fact, Waterhouse was found to have been diligent even though the witness listed in a police report was not contacted until over 30 years after the police report was disclosed.

In *Johnson v. State*, 44 So. 3d at 72 n.18, the pieces of paper with the notations that gave rise to *Henry*, *Giglio*, and *Brady* claims were turned over to collateral counsel in 1997. However, the meaning of the cryptic notes was not ascertained until 2006, when collateral counsel learned from another attorney how to decipher the meaning of the notes. This Court concluded that, because the notes were virtually indecipherable on their own, *Johnson* had exercised due diligence. *Id.* at 72 n.18 ("Our review of Pickard's notes relating to James Smith shows that the dates on those notes give no hint as to their purpose, for the dates do not coincide with trial or deposition dates. Also, there are no initials on several pages of those notes, and no indication whatsoever who wrote them or for what purpose. In fact, the notes appear

to have been written by several persons. Key passages are cryptic. The fact that defense counsel had to send the notes to counsel in another part of the state to be deciphered attests to the notes' inscrutability and to defense counsel's diligence. Based on our review of Pickard's notes relating to James Smith, we conclude that defense counsel exercised due diligence in raising the present *Giglio* claim.").

The ability to have accessed information earlier by employing 20/20 hindsight is not the standard for determining whether due diligence was exercised. What matters is whether the State's conduct misled the defense or precluded the defendant from knowing that the State had failed to honor its constitutional obligations.

The State's argument at its core is the one rejected in *Banks*, *Waterhouse* and *Johnson*, i.e. that the defendant must presume every word out of the prosecutor's mouth is a lie and every action taken by the prosecutor was a violation of his ethical and constitutional obligations. The State's position is that as long as a defendant does not catch the State's concealment of a prosecutor's misconduct within one year of the finality date of the conviction and sentence, the prosecutor's misconduct cannot be remedied. The State's position means that the longer the misconduct is hidden and the better hidden it is, the defendant's ability to obtain relief from the constitutional violation is diminished. This will only serve to encourage trial

prosecutors, appellant prosecutors, and collateral prosecutors to hide misconduct. The State's argument is clearly contrary to *Banks v. Dretke*.

At no point in time has any prosecutor in Mr. Thomas' case stepped forward and come clean. *See Banks v. Dretke*, 540 U.S. at 675-76 ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."). Until the State comes clean, the defendant is entitled to assume that the State violated *Giglio* or *Brady*. Here that never happened. Mr. Thomas' counsel stumbled upon information regarding Dixon that led to the bombshell in the transcripts from the 2000 evidentiary hearing on Cason's 3.850 motion. And Mr. Thomas filed his 3.851 motion within one year of when he discovered the string and started unraveling what the State had hidden.

Accepting Mr. Thomas' factual allegations as true and considering the case law on which Mr. Thomas relies, he has shown that he exercised due diligence, or at the very least that an evidentiary hearing is required.

As to Mr. Thomas' *Giglio* argument, the State knowingly misled the judge and the defense when he advised in October of 1993 that Cason would be a witness at Mr. Thomas' trial. The State knowingly allowed Cason in his deposition before

Mr. Thomas' trial to give false or misleading testimony that the prosecutor did not correct. As Mr. Bateh testified in 2000, seven years later, he never had any intention of calling Cason as a witness because he believed that his murder was so heinous that he would have no credibility with the jury. In fact, he was very reluctant to agree to drop death in Cason's case due to the heinousness of Cason's murder. But he ultimately did agree when Cason's attorney said would cooperate in Mr. Thomas' prosecution. This was Mr. Bateh's testimony in 2000.

Clearly, the assistance Cason offered was seen as valuable. This shows that Mr. Bateh's case against Mr. Thomas was actually quite weak. This constitutes undisclosed impeachment of the State's case under *Kyles v. Whitley*, 514 U.S. 419 (1995).

Further, the fact that Mr. Bateh recruited Cason to help him build his case against Mr. Thomas not only raises obvious questions about the admissibility of Ahmad Dixon's testimony, but could be used to impeach the other jailhouse witnesses. Cason clearly was Mr. Bateh's man in the jail and a conduit to inmates who could be talked into fabricating evidence against Mr. Thomas.

Specifically as to Dixon, Mr. Thomas has alleged that accepting Dixon's testimony as true (that Mr. Thomas confessed to the murder in his presence after

Cason told him to continue), Mr. Thomas' alleged statement was inadmissible under the Sixth Amendment. The State ignores this factual allegation. It does not accept it as true. It does not address it at all. The erroneous admission of Dixon's testimony cannot be found harmless beyond a reasonable doubt. This is particularly true given that Cason was in a position to coach other witnesses, and given that Mr. Bateh was so willing to make a deal with Cason once he offered to help him shore up his weak case against Mr. Thomas.

But even if Dixon's testimony is allowed in, Mr. Bateh's testimony in 2000 provides the defense a means to show through the uncorrected false or misleading testimony given by Dixon that in all likelihood Cason and his best friend in the jail concocted the story that Mr. Thomas' confessed out of thin air. By fabricating a story against Mr. Thomas, Dixon got to save the life of his best friend who Mr. Bateh has testified had committed one of the most egregious murders he had seen in Jacksonville at that time. Dixon, who claimed he was offended by Mr. Thomas' confession to a murder and just went to the State on his own, testified that Cason was his best friend in the jail. That's the Cason who had committed one of the most heinous murders in Jacksonville according to Mr. Bateh.

Moreover, Mr. Thomas has alleged that the records maintained by the clerk

of court show that Dixon's deposition testimony was false and/or misleading. It was not corrected by Mr. Bateh. Accepting the factual allegations as true, that is a second *Giglio* violation that must be considered cumulative in deciding whether the State can prove the *Giglio* violations harmless beyond a reasonable doubt.

This Court in granting relief in *Johnson v. State* held:

> It must be emphasized that in our American legal system there is no room for such misconduct, no matter how disturbing a crime may be or how unsympathetic a defendant is. The same principles of law apply equally to cases that have stirred passionate public outcry as to those that have not. *Cf. Jones v. State*, 705 So.2d 1364, 1367 (Fla. 1998) (noting that although "the rule of objective, dispassionate law in general [ ] may sometimes be hard to abide, the alternative—a Court ruled by emotion—is far worse"). In our system of justice, ends do not justify means. Rather, experience teaches that the means become the end and that irregular and untruthful arguments lead to unreliable results. Lawlessness by a defendant never justifies lawless conduct at trial. *See, e.g., United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Giglio*; *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Guzman v. State*, 868 So.2d 498 (Fla. 2003). The State must cling to the higher standard even in its dealings with those who do not. Accordingly, we must grant relief.

Johnson v. State, 44 So. 3d at 73.[10]

[10]Also applicable is the U.S. Supreme Court's ruling in *Johnson v. Mississippi*. There, the Supreme Court wrote:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to **a special " 'need for reliability in the determination that**

The constitutional violations at issue here are at least as bad as those in *Johnson*. At a minimum, an evidentiary hearing must be ordered.

CONCLUSION

In light of the foregoing arguments and those in his Initial Brief, this Court must reverse the circuit court's ruling that Thomas's motion to vacate was untimely and procedurally barred.

> **death is the appropriate punishment'"** in any capital case. *See Gardner v. Florida*, 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)).

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by email, to Jennifer A. Donahue, Assistant Attorney General, at her primary email address: jennifer.donahue@myfloridalegal.com on July 9, 2018.

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CERTIFICATE OF COMPLIANCE

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

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