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No. SC19-1512
Lower Tribunal No. 16-2008-CF-011059-BXXX-MA

IN THE

Supreme Court of Florida

BILLY JIM SHEPPARD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Linda McCallum
Judge of the Circuit Court

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS iii

ARGUMENT IN REPLY 1

I. THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE AT THE GUILT PHASE OF MR. SHEPPARD'S CAPITAL TRIAL 1

II. THE CIRCUIT COURT ERRED IN FINDING THAT NEWLY DISCOVERED EVIDENCE REGARDING MICHAEL ROBERTS' RECANTATION WAS INADMISSIBLE HEARSAY AND THEREFORE, MR. SHEPPARD WAS NOT ENTITLED TO RELIEF ON THIS CLAIM. 11

III. THE CIRCUIT COURT ERRED IN FINDING THAT *BRADY/GIGLIO* VIOLATIONS DID NOT OCCUR AT MR. SHEPPARD'S TRIAL CONCERNING MICHAEL ROBERTS AND WILLIE CARTER 25

IV. THE CIRCUIT COURT ERRED IN FINDING THAT MR. SHEPPARD WAIVED THE CLAIM OF NEWLY DISCOVERED EVIDENCE BY KHALILAH COOK MEJORS AND THAT MR. SHEPPARD WAS OTHERWISE NOT ENTITLED TO RELIEF AS TO THIS CLAIM 28

V. THE CIRCUIT COURT ERRED IN FINDING THAT MR. SHEPPARD WAIVED THE BRADY/GIGLIO CLAIM REGARDING KHALILAH COOK MEJORS AND THAT MR. SHEPPARD WAS OTHERWISE NOT ENTITLED TO RELIEF AS TO THIS CLAIM. 31

VI. THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. SHEPPARD OF A FUNDAMENTALLY FAIR TRIAL 33

CONCLUSION AND RELIEF SOUGHT 35

CERTIFICATE OF SERVICE 36

CERTIFICATE OF COMPLIANCE 36

TABLE OF CITATIONS

Cases

Andres v. State, 254 So.3d 283 (Fla. 2018) 33, 34

Beachum v. State, 547 So.2d 288 (Fla. 1st DCA 1989).....29

Brady v. Maryland, 373 U.S. 83 (1963) .....*passim*

Brooks v. State, 918 So.2d 181 (Fla.2005) 34

Cherry v. State, 659 So.2d 1069 (Fla. 1995) 34

Davis v. State, 928 So.2d 1089 (Fla. 2005) 27

Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982).....30

Dinter v. Brewer, 420 So.2d 932 (Fla. 3d DCA 1982).....12

Duckett v. State, 918 So.2d 224 (Fla. 2005) 13, 14

Evans v. State, 177 So.3d 1219 (Fla. 2015).....34

Giglio v. United States, 405 U.S. 150 (1972) .....*passim*

Gudinas v. State, 816 So.2d 1095 (Fla. 2002).....29

Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995).....34

Hurst v. State, 18 So.3d 975 (Fla. 2009).....34

Jackson v. State, 575 So.2d 181 (Fla.1991).....34

Jones v. State, 678 So.2d 309 (Fla. 1996).....12, 13, 25

Jones v. State, 591 So.2d 911 (Fla. 1991).....14

Kearse v. State, 770 So.2d 1119 (Fla. 2000) 29

Kyles v. Whitley, 514 U.S. 419 (1995).....32

Long v. State, 668 So.2d 1058 (Fla. 2d DCA 1996).....30

Mansfield v. State, 204, So.3d 14 (Fla. 2016).....13, 14

McDuffie v. State, 970 So.2d 312 (Fla. 2007).....33, 34

Mitchell v. State, 580 So.2d 852 (Fla. 2d DCA 1991).....30

Robinson v. State, 707 So.2d 688 (Fla. 1998).....13, 16

Rogers v. State, 957 So.2d 538 (Fla. 2007) 34

Smith v. State, 400 So.2d 956 (Fla.1981).....25

Smith v. State, 931 So.2d 790 (Fla. 2006).....33

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) 33, 34

State v. Gunsby, 670 So.2d 920 (Fla. 1996) 34, 35

State v. Woodel, 145 So.3d 782 (Fla. 2014) 35

Strickland v. Washington, 466 U.S. 668 (1984) 34

Strickler v. Greene, 527 U.S. 263 (1999) 33

Suggs v. State, 923 So.2d 419 (Fla. 2005) 34, 35

United States v. Davis, 639 F.2d 239 (5th Cir. 1981).....30

Wyatt v. State, 71 So.3d 86 (Fla. 2011) 27

Statutes

Section 90.804(2)(c), Fla. Stat. (2018) 12, 16

Section 775.15(6), Fla. Stat. (2007); Ch. 97-90, § 1, Laws of Fla. 16

ARGUMENT IN REPLY[1]

I. THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF MR. SHEPPARD'S CAPITAL TRIAL.

Appellee fails to substantively address any arguments made by Sheppard in his Initial Brief concerning the ineffectiveness of trial counsel. (AB. 49-83).[2] Appellee merely quotes language from the postconviction court's order, offering no independent analysis as to arguments that the postconviction court erred in its findings, and therefore, offering no reason for this Court to reject the arguments in Sheppard's initial brief that trial counsel was ineffective.

Appellee generally claims that Sheppard failed to "specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonably competent performance under prevailing professional norms." (AB. 49). However, appellee fails to address Sheppard's arguments, as to each of these claims of deficient conduct, that the postconviction court's findings were not based upon competent substantial evidence.

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[1] This reply will address only the most salient points argued by the State. Sheppard relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

[2] The following will be utilized to cite to the record: "R."- record on direct appeal; "T." – trial transcript; "PCR." – postconviction record on appeal; "IB." – refers to Sheppard's initial brief; "AB." – refers to the State's answer brief. Any additional citations will be self-explanatory.

Appellee further states that even if some actions could be considered deficient, Sheppard failed to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (AB. 49). In support of these assertions, Appellee states, "the evidence of guilt is just too strong." (AB. 50; 61).

A. Failure to present a reasonably competent misidentification defense

1. Failure to retain a misidentification expert

Appellee states that the lower court correctly determined that "[i]t was reasonable for trial counsel to believe that [retaining an eyewitness identification expert] would likely create more evidence that would damage Defendant's case." (AB. 63). This is just absurd. Furthermore, neither the State nor the postconviction court, nor trial counsel himself, ever offered an example of what sort of evidence that such an expert could "create" that would harm Sheppard. This finding by the court erroneously relies upon trial counsel's testimony that Sheppard said "[T]here's no way that bitch could have seen me." (AB. 63). Trial counsel's testimony, as to this statement by Sheppard and further conversations related to the statement, was impeached at the evidentiary hearing and is thoroughly addressed in Sheppard's initial brief. (IB. 24-25; 40). As to the prejudice prong, Appellee states, "evidence of guilt in this case makes it impossible for Appellant to demonstrate that the results

of the proceeding would have been different if trial counsel retained an eyewitness identification expert as a consultant or witness at trial." (AB. 63).

Appellee cites to the court's order, relying upon trial counsel's testimony that a misidentification defense is "common sense" and that he "never really considered it because you can't get an expert to give an opinion as to the ultimate fact in this case." (AB. 62). Both of these arguments fail. Factors that affect the reliability of a witness's identification are certainly not common sense, as evidenced by trial counsel's own testimony that he had no idea about such factors until he read Sheppard's postconviction motion. (PCR. 3659). If trial counsel, who presumably has utilized a misidentification defense at some other point in his career, is not aware of these factors affecting the reliability of identifications, then how could jurors be aware of such factors? Additionally, Sheppard's claim does not assert that a misidentification expert would testify to the "ultimate fact in the case." Sheppard's claim is that such an expert could both advise counsel on cross-examination of eyewitnesses, and testify as to the factors that may make a witness's identification unreliable. Trial counsel could then have argued to the jury that the eyewitness identifications made in this case were unreliable due to those factors as testified to by the misidentification expert. Misidentification was counsel's entire defense at trial. (PCR. 3657). Failing to retain an expert who could educate trial counsel, as well as the jury, on factors affecting the reliability of eyewitness identifications was

not based on any reasonable strategy. Sheppard was prejudiced by this failure because his entire defense rested on the fallibility of eyewitness identification and jurors were not educated on factors they should have considered when determining the credibility and reliability of witnesses in the case.

2. Failure to present to the jury the different descriptions of the car involved in the shooting that would have supported a misidentification defense

Appellee states that trial counsel's "strategy was reasonable given the competent, substantial evidence that supports [Appellant's] conviction." (AB. 64). Appellee further states, "In reaching this conclusion, the lower court highlighted trial counsel's view that misidentification of the vehicle did not necessarily translate into misidentification of the shooter." (AB. 64). Again, Appellee claims that the "evidence of guilt in this case makes it impossible for Appellant to demonstrate that the results of the proceeding would have been different if trial counsel challenged the descriptions of the car." (AB. 65).

Trial counsel's own arguments to the jury directly refute this argument by Appellee. Although stated in Sheppard's initial brief, these arguments made by counsel during trial to members of the jury bear repeating: "[I]f I could boil this case down to one or two words, I would say misidentification is an important one, and it all rests on one other word and that word is 'decal'." (T. 970); "If this isn't the same car, this case is over." (T. 974); "Everything rests on it being the same car. Their

entire theory rests on it being the same car. That's a big hole in their case." (T. 975); "It's a case about misidentification. And it goes to the car, and it goes to the person. And that is a serious legitimate question for you because if it's not the same car, their case fails." (T. 977); "The identification of the car is in question. The identification of Sheppard is in question. Those by themselves raise a reasonable doubt." (T. 983); "Whether or not it's the same car, I think I've beaten that horse to death. That's shaky." (T. 993); If you're vacillating over whether it's the same car, if you're vacillating over whether or not the identification was right, then you will not have an abiding conviction … telling you what to do." (T. 994).

Trial counsel's claim that "misidentification of the vehicle did not necessarily translate into misidentification of the shooter" is simply not credible and is belied by his own repeated arguments to the jury that **"everything rests on it being the same car."** (T. 975)(emphasis added). Therefore, the court's findings, which rely upon this incredible claim by trial counsel, are not based upon competent substantial evidence. Sheppard was prejudiced by this deficient conduct because counsel failed to support his own defense at trial. He claimed that it was not the same car, yet failed to provide any evidence that it was not the same car. Had the jury heard the inconsistencies in the descriptions of the car, there actually would have been a reasonable doubt that Sheppard was the shooter.

In addressing the decal on the window and the license plate, Appellee disregards any conflicting descriptions of the car, and seems to argue that the uniformity of certain aspects of the vehicle outweigh "*de minimus issues*" such as the decal and the license plate. (AB. 65-66). Again, Sheppard was prejudiced by trial counsel's deficient conduct in this instance because his entire defense revolved around whether this was the same car. Had counsel brought out these differences in the descriptions of the vehicle involved in the shooting there would have been a reasonable doubt as to whether it was the same vehicle that Sheppard had been seen in earlier, and therefore, a reasonable doubt as to whether Sheppard was the shooter.

B. Failure to effectively cross-examine Dtalya Barrett

Appellee attempts to minimize the inconsistencies in statements made by Barrett, claiming that her "statements and testimony were not inconsistent for impeachment purposes" and that "the discrepancies, if any, are insignificant and do not directly contradict or materially differ from Barrett's trial testimony." (AB. 72).

Barrett's testimony involved descriptions of the car, as well as the shooter. She made prior inconsistent statements as to both. When Sheppard's entire defense at trial hinged on whether the car involved in the shooting was the same car that Sheppard had taken from Dorsette James earlier that day, then inconsistent descriptions of the vehicle are anything but insignificant.

Appellee points to the court's findings, which are based on trial counsel's testimony at the evidentiary hearing. As stated *supra*, his testimony at the evidentiary hearing with regard to the defense at trial is directly refuted by what he actually argued to the jury at trial. His testimony as to this issue is not credible and cannot be relied upon as competent substantial evidence. Trial counsel claims that any inconsistencies in Barrett's descriptions of both the vehicle and the shooter were "minor details". (AB. 74). This assertion simply cannot be given any weight. The devil is in the details. She initially claimed to have seen a decal on the rear window of the vehicle involved in the shooting. However, James' car, which Sheppard admitted to taking, did not have a decal on the rear window. At trial, Barrett identified James' car as the vehicle involved in the shooting without ever being challenged with her prior inconsistent statements about the car. Counsel's misidentification defense revolved around there being two different cars. No reasonable trial attorney would have failed to bring out this information, which would have supported the argument that there were two different cars, and that the car Sheppard admitted to taking was not the same car involved in the shooting. There was no assertion at trial that Sheppard ever got into a different vehicle. The State argued that he took James' car, switched seats with the co-defendant[3], and was in

[3] As argued in Sheppard's initial brief, there was also no evidence to support this particular argument made by the State of Sheppard switching seats with the co-defendant. (IB. 83).

the passenger seat when he shot the victim. Counsel had no reasonable strategy for failing to bring out this information to the jury. These prior inconsistent statements of Barrett were evidence that trial counsel had available to him and he inexplicably failed to use to support his defense. Sheppard was prejudiced by this deficient conduct because jurors never had a reason to question the reliability of Barrett's description of the vehicle or the shooter. Evidence supporting the idea that there were two different cars would have given rise to a reasonable doubt as to whether Sheppard was the shooter.

C. Failure to challenge the State's ballistics evidence.

Appellee argues that Sheppard fails to establish deficient performance or any resulting prejudice, as a result of trial counsel's failure to challenge the State's ballistics evidence. Appellee cites to trial counsel's attempted justification that "challenging the ballistics evidence might hurt a defense based upon misidentification of the shooter." (AB. 80). The postconviction court's reliance on this excuse is not based upon competent substantial evidence because it fails to acknowledge that challenging ballistics testimony is not inconsistent with a misidentification defense. Trial counsel also claimed at the evidentiary hearing that the defense was misidentification and reasonable doubt. (PCR. 3640). The court overlooks that a reasonable doubt defense essentially amounts to chipping away at every piece of evidence presented by the State. Her claim that reasonable doubt was

part of the defense is inconsistent with her failure to challenge the ballistics evidence in any meaningful way.

As to the prejudice prong, Appellee claims that even if Tobin testified at trial, and presumably refuted the overstated testimony by Warniment, that the jury could still conclude that a 9mm Smith and Wesson firearm was used in both shootings. (AB. 82). Therefore, Sheppard fails to demonstrate how this evidence would undermine confidence in the verdict. (AB. 82-83). In making this argument, Appellee seems to concede that Warniment's testimony – that the same gun was fired at both the Wimberly and Stafford crime scenes – was overstated.

Appellee's statements regarding Tobin's testimony are factually incorrect. Appellee states, "In [Tobin's] opinion the caliber of a bullet or shell casing can be identified objectively. R-3451-3452" (AB. 81). Appellee's citation to the record does not contain this information. Neither does R-3551-3552. Appellee then states, "Additionally, the weapon manufacturer and production lot could be determined objectively. R-3545-3546." (AB. 81). These pages in the record do not contain this assertion. What Tobin actually said on these pages was very much the opposite. He was discussing a publication wherein two cartridge cases, which were fired from two completely different firearms from the same production lot, were virtually indistinguishable. (PCR. 3545-46). The purpose of this study and publication was to alert the firearm toolmarks community that subclass characteristics from the

manufacturing process could result in a misattribution or a false identification. (PCR. 3545-46). In other words, subclass characteristics could easily be confused with individual characteristics, which examiners rely on to make their already-subjective identifications. The production lot was known at the time of the experiment. Contrary to Appellee's assertion, Tobin does not claim that an examiner could objectively identify the production lot of a weapon simply by examining the projectile or the cartridge case. (*See also* PCR. 3575-76). There was also no testimony from Tobin that an examiner would be able to determine the exact manufacturer of a firearm based on their examination of a projectile or cartridge case.

Appellee states, "While identifying a particular firearm may require subjective analysis, Tobin conceded that someone using objective, scientifically based techniques could examine shell casings and bullets from a crime scene and determine the caliber, manufacturer, and production lot of a firearm used during the crime." (AB. 81-82). Appellee gives no citation for this unsupported claim. Appellee then states that even if Tobin testified at trial, the jury could still conclude that a 9mm Smith and Wesson was used at both crime scenes. (AB. 82). Sheppard does not dispute that the caliber of the projectile or cartridge case may be able to be determined, as well as possible manufacturers. Furthermore, testimony that 9mm caliber ammunition was found at both crime scenes is a far cry from Warniment's

testimony at trial that the projectiles and cartridge cases found at both scenes were fired by the same gun. (T. 812-13; 818-19). Contrary to Appellee's argument, if jurors only heard that the same caliber ammunition was found at both crime scenes versus the ammunition was all fired from the same gun, the result of the proceeding would have been different.

II. THE CIRCUIT COURT ERRED IN FINDING THAT NEWLY DISCOVERED EVIDENCE REGARDING MICHAEL ROBERTS' RECANTATION WAS INADMISSIBLE HEARSAY AND THEREFORE, MR. SHEPPARD WAS NOT ENTITLED TO RELIEF ON THIS CLAIM.

Appellee claims: "The lower court correctly determined that Michael Roberts' alleged recantation failed to qualify as a statement against interest. Because the alleged recantation constitutes inadmissible hearsay, the lower court correctly determined that the alleged recantation is not evidence. Therefore, it cannot qualify as newly discovered evidence." (AB. 84; 90).

This is misleading. The postconviction court never conducted an analysis of this evidence as a statement against interest, but rather summarily concluded: "Roberts' statements do not qualify as exceptions to hearsay. They are not former testimony, were not made under the belief of impending death, are not statements against interest, or statements of family or personal history." (PCR. 2790).

Furthermore, due to the finding that this recantation was inadmissible hearsay, the court never analyzed whether this qualified as newly discovered evidence that would require relief.

At the evidentiary hearing, Sheppard argued that these statements by Roberts should have been admitted as an exception to hearsay pursuant to Section 90.804(2)(c), Florida Statutes. (PCR. 3800-01). In addition, Sheppard presented evidence that Roberts knew that he was subject to perjury charges based on his recantation. (PCR. 335). However, the postconviction court never addressed Sheppard's arguments that the statements by Roberts should have been admissible because they were against his interest and he was most certainly aware of that fact.[4] *See Dinter v. Brewer*, 420 So.2d 932, 935, n.4 (Fla. 3d DCA 1982).

Appellee improperly conflates Sheppard's argument that the recantation qualifies as a statement against interest with the argument that this recantation is newly discovered evidence pursuant to *Jones v. State*, 678 So.2d 309 (Fla. 1996).[5]

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[4] Roberts was killed just prior to the evidentiary hearing. Sheppard submitted his death certificate to prove that he was unavailable. Appellee does not contest his unavailability for purpose of this argument. (AB. 85).

[5] Appellee misconstrues Sheppard's argument in his initial brief as to the portion of section 90.804(2)(c) involving a statement that inculpates the declarant and exculpates the defendant. (IB. 93-94; AB. 84). Contrary to Appellee's assertion, Sheppard was not attempting to "avoid the corroboration required for a recantation to qualify as a statement against interest." (AB. 84). Rather, Sheppard was explaining why this case was different to other relevant cases insofar as this was not a case whereby a co-defendant initially testified that the defendant committed the

Appellee contends that "if the recantation is not exculpatory, then it fails to satisfy the [second] requirement that 'newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.'" (AB. 84).[6] First, there is no requirement that newly discovered evidence must be exculpatory. Second, Appellee fails to recognize that newly discovered evidence satisfies the second prong of *Jones* if it weakens the case against the defendant and gives rise to a reasonable doubt as to his culpability. *Jones*, 678 So.2d at 315.

In support of its findings, the postconviction court relied upon cases which rejected claims of newly discovered evidence based on out-of-court recantations that the recanting witness did not repeat under oath at an evidentiary hearing. (PCR. 2787)(*citing Mansfield v. State*, 204, So.3d 14, 17 (Fla. 2016); *Duckett v. State*, 918 So.2d 224, 232-33 (Fla. 2005); *Robinson v. State*, 707 So.2d 688, 691 (Fla. 1998).

In *Mansfield* and *Duckett*, this Court held that a witness's out-of-court admissions that he lied at trial must sufficiently weaken the State's case such that they would probably produce an acquittal if the case was retried, and it affirmed the

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crime and then recanted to say that the he (the declarant) actually committed the crime. Sheppard further offers corroboration for Roberts' recantation in the form of certified court documents pertaining to his reduced sentences for two of his cases and an outright dismissal for a third case. (IB. 93-94, n. 38).

[6] Appellee does not challenge the first prong of *Jones*, that this evidence was unknown by the trial court, by the party, or by counsel at the time of trial, and could not have been known through the use of due diligence.

denial of relief because (1) the State could have kept the out-of-court recantations out by simply not calling the witnesses at a new trial, and (2) there was sufficient other evidence to lead to a conviction. However, that is not the case here because the State could not have obtained the convictions without Roberts' testimony that Sheppard confessed to two murders.

The only direct evidence linking Sheppard to the Stafford murder was the confession that Sheppard allegedly made to Roberts and to which Roberts testified at trial. All other evidence used by the State at trial to link Sheppard to the Stafford murder rests on faulty assumptions: (1) that the exact same gun was fired at both crime scenes based on overstated ballistics testimony; (2) that the same person fired this same gun at both crime scenes; and (3) that Sheppard was correctly identified by Barrett as the shooter in the Wimberly murder. Likewise, the only direct evidence linking Sheppard to the Wimberly murder was this alleged confession by Sheppard and the shaky identification by Barrett.

Roberts' recantation of his trial testimony weakens the case against Sheppard and gives rise to a reasonable doubt as to his culpability. In applying the two-prong test for newly discovered evidence, this Court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v.* State, 591 So.2d 911 (Fla. 1991).

Not only did Roberts admit that Sheppard never confessed to killing two people, but he also admitted that Sheppard never asked him to kill Barrett. This is important as his trial testimony that Sheppard asked him to kill Barrett because she was an eyewitness only bolstered her problematic identification of Sheppard. If jurors heard that Sheppard wanted to kill her because she saw him shoot Wimberly, then the fact that she identified Sheppard as the shooter seems more credible.

At a new trial, and without Roberts' testimony or his recantation, the only evidence the State would have against Sheppard for the Stafford murder is evidence that the same caliber gun was fired at both the Stafford and Wimberly scenes. That simply is not proof beyond a reasonable doubt that Sheppard killed Stafford. Likewise, at a new trial, and without Roberts' testimony or his recantation, the only evidence the State would have against Sheppard for the Wimberly murder is Barrett's shaky identification of Sheppard as the shooter, as well as all of her prior inconsistent statements that were not previously brought out concerning her identification of the car, which is inextricably intertwined with her identification of the shooter. Without testimony that Sheppard confessed to this murder, and testimony that he asked Roberts to kill Barrett because she saw him shoot Wimberly, the State's case is significantly weakened and there is a reasonable doubt as to Sheppard's culpability.

In *Robinson*, this Court found that the trial court did not abuse its discretion in concluding that the out-of-court recantation at issue failed to satisfy the hearsay exception for statements against interest in section 90.804(2)(c), Fla. Stat. *Robinson*, 707 So.2d at 691-92. The Court found the recantation in *Robinson* did not expose the declarant to criminal liability because, at the time, there was a three-year statute of limitations. 707 So.2d at 692 & n.8. Additionally, the Court held that there was no independent corroborating evidence that supported the recantation. Thus, *Robinson* makes clear that an out-of-court recantation can require relief, contrary to the postconviction court's holding in this case. Because the postconviction court did not purport to even consider whether Sheppard had satisfied the requirements of section 90.804(2)(c), there is no evidentiary ruling to which this Court should afford any deference. The rule provides that when the declarant is unavailable as a witness, which is undisputed here, his hearsay statements are nonetheless admissible to exculpate the accused if (1) they tend to expose the declarant to criminal liability; and (2) corroborating circumstances show their trustworthiness. §90.804(2)(c), Fla. Stat. (2018).

In this case, Roberts' statements exposed him to criminal liability for perjury in a capital case, for which there has been no statute of limitations since 1997. §775.15(6), Fla. Stat. (2007); Ch. 97-90, § 1, Laws of Fla. Roberts' actions and words remove any doubt that he understood his statements exposed him to criminal

liability. (PCR. 3817-18). Moreover, corroborating circumstances show the trustworthiness of Roberts' statements. Indeed, all of Roberts' statements to postconviction counsel regarding the circumstances of his trial testimony, his dealings with Caliel, and his recantation have been corroborated with other evidence:

(i) At Sheppard's trial in 2012, Roberts testified that he shared a cell at the Duval County Jail with Sheppard in April 2009, that Sheppard confessed to two murders to him, and that Sheppard asked him to kill a witness. He also testified that he was promised nothing by the State in exchange for his testimony against Sheppard. In his recantation, he stated that his testimony was a lie – that Sheppard never confessed to him; that Sheppard never asked him to kill a witness; and that he was indeed promised a deal by the State in exchange for his testimony against Sheppard.

After the time that Sheppard supposedly made these statements to Roberts, yet before he became a witness for the State, his charges were dismissed and he was released from jail. (T. 737). It was only after he was rearrested and in the Nassau County Jail facing burglary charges that he decided to contact the State Attorney's Office. (T. 739). He stated that it was his intention to speak with Caliel about the Sheppard case because he "knew how he uses jail house snitches on his cases." (PCR. 2312-17).

(ii) Roberts stated that Caliel first sent detectives to visit him at the jail, and that these detectives provided him details of the murders that Sheppard was charged with committing. (PCR. 2312-17). Roberts stated that Caliel went to see him at the jail along with Roberts' attorney. (2312-17). Roberts stated that during this meeting, "Caliel told me I was facing 10 to 99 years, **depending on my testimony**." (PCR. 2312-17) (emphasis added). "He told me **that if I cooperated, he would testify on my behalf in my Nassau County and Washington County charges and my Duval County charge would go away**." (PCR. 2312-17) (emphasis added).

This is nothing, if not a deal. Furthermore, this deal is corroborated by evidence that after Roberts testified in Sheppard's case, indeed his Nassau County and Washington County cases were favorably resolved, and his Duval County case was dismissed. (PCR. 2467-78; 2524-29). Roberts stated, "After I testified, I went to sentencing in Nassau County. My attorney told me I was getting 8 years because the State was so happy with the way I testified in the Sheppard case. He also said, as promised by the State, my Duval County charge went away, and he and Caliel were already talking to the State Attorney in Washington County." (PCR. 2312-17). Roberts stated that when he was transported to Washington County, he received a 7-year concurrent sentence for his violation of probation, and that he was originally sentenced to 15 years of probation. (PCR. 2312-17)

This information is also corroborated by court documents showing that he actually received this sentence, as well as an email from Assistant State Attorney John Kalinowski to Caliel asking whether Caliel would be able to attend Roberts' sentencing in Nassau County, to which Caliel replied "Roberts did great. Probably the best witness I ever put on … I am planning to head to Nassau Co. next Thursday morning, should be there around 8-8:15 am."(PCR. 1760).

(iii) Roberts stated that when he decided to cooperate and testify against Sheppard, he "was told the State was going to keep [him] on the back burner so they didn't have to disclose [him] as a witness. (PCR. 2312-17). Roberts also stated, "My attorney said that Mark Caliel said there was no need for me to give the state a statement. I had to enter an open plea so the defense couldn't use any written promises against me." (PCR. 2312-17). Trial counsel for Sheppard confirmed that he was not in possession of any such deal between Roberts and the State. (PCR. 3709).

(iv) Roberts stated that just prior to his testimony in Sheppard's trial, Caliel had him brought to the State Attorney's Office. "Caliel wanted me to focus on the witness identification and the shooting of the kid on the bike. Caliel also told me to say that [Sheppard] mentioned going to the corner store after shooting the guy in the car." (PCR. 2312-17). It is not a coincidence that Caliel wanted Roberts to testify to these specifics of the case because these details are what tie the three crime scenes

together, and support the State's theory of the case -- that Sheppard and his co-defendant tried to steal a car from Stafford and when he resisted, they shot him; that they next went to the corner store where they took the car belonging to Dorsette James; and that after taking James' car, they drove to the apartments where Wimberly was shot.

(v) Appellee claims that Roberts told Caliel that he only recanted while he was in jail because the visits from postconviction counsel worried him. (AB. 89-90). Notably, it would be to Caliel's benefit if this statement by Roberts was true, inasmuch as it would defeat Sheppard's postconviction claims related to Roberts. More importantly, though, this alleged statement by Roberts simply does not make any sense. First, Roberts recanted during the first visit with Shannon, an investigator with Sheppard's postconviction team. (PCR. 3800; 3803). He then repeated his recantation and signed an affidavit when Shannon and Pafford, former co-counsel of Sheppard's case, went back to visit him at the prison. (PCR. 2312-17; 3809-10; 3826-27). Second, if he was seen by other inmates while meeting with defense counsel, it's not plausible that he would be in fear for his safety, yet the opposite might be true, if he was somehow seen meeting with prosecutors or police he might justifiably be afraid of being labeled a snitch. Furthermore, if this were true, then why did Roberts continue to stay in contact with Sheppard's postconviction team even after he was released from prison? This is illogical.

(vi) Appellee also claims that Roberts told Caliel that he only recanted to get postconviction counsel to leave him alone. (AB. 89-90). Not only did Roberts stay in contact with Sheppard's postconviction team after he was released but he gave postconviction counsel evidence to corroborate his dealings with Caliel. During one such conversation with Sheppard's postconviction team after he was released from prison, Roberts stated that Caliel sent investigators from the State Attorney's Office to locate him in Hilliard, Florida, where they informed him (Roberts) that Caliel wanted to speak with him. Roberts spoke to Caliel on July 26, 2017, via telephone, where the two set up a meeting at the Duval County State Attorney's Office for July 28, 2017. During this meeting, Roberts stated that Caliel threatened to charge Roberts with perjury if he followed through with his recantation. (PCR. 3427; 3429). He stated that Caliel then suggested possible reasons Roberts could give to explain why he recanted to Sheppard's postconviction team, offering that perhaps he was scared for his life because he was in population with Sheppard's co-defendant. (PCR. 3427). During his testimony, Caliel provided corroboration for these events, admitting to sending out investigators to find Roberts, talking to Roberts on the phone, and meeting with Roberts at the State Attorney's Office. (PCR. 3359-60). However, Caliel conveniently denied threatening Roberts with a perjury charge. (PCR. 3358).

(vii) Roberts also told Sheppard's postconviction team that during this meeting with Caliel at the State Attorney's Office, he told Caliel that he needed help getting his driver's license back. (PCR. 3427). This is confirmed by Caliel. (PCR. 3362). He explained to Caliel that he could not afford to pay the court costs, fines, fees, plus the interest that accumulated while he was in prison; that he could not pay them without a job; and that in order to get a job, he needed a valid driver's license. Roberts stated that Caliel offered to set him up with his friend, former Duval County prosecutor turned defense counsel, Anthony "Butch" Berry. (*See* PCR. 3433-34; 3437-38). This is corroborated by Caliel himself, who admitted to setting Roberts up with Berry. (PCR. 3362-64). This is also corroborated by text messages, and voicemails from Caliel to Roberts, indicating that Berry would be helping him resolve the issue with his court costs, which would enable him to have his driver's license reinstated. (PCR. 3364-65; 1967-73). Caliel confirmed the authenticity of these voicemails. (PCR. 3431-32). A court order vacating and setting aside the previously ordered court costs also reflects Berry as the attorney for Roberts. (PCR. 1974-2031). This evidence provided by Roberts to Sheppard's postconviction team belies Caliel's claim Roberts just wanted postconviction counsel to leave him alone. Had Roberts really wanted to be left alone, he would not have stayed in contact with Sheppard's defense team and certainly would not have provided voicemails from the prosecutor to corroborate this information.

(viii) In addition, there are circumstances corroborating that Roberts was threatened with perjury and scared to come to court for fear of being arrested. Following Sheppard's motion to disqualify Caliel and the State Attorney's Office, the court held a hearing, wherein Shannon testified to Roberts' concerns. (PCR. 3389-96). Shannon testified that he spoke to Roberts twice on the phone prior to this motion hearing. (PCR. 3389-96). During one of these phone calls, Shannon told Roberts that the motion to disqualify had been filed and that his testimony was needed. Roberts asked whether or not he could be charged with perjury, and when Shannon stated that he could not give any legal advice, Roberts hung up. (PCR. 3394; 3440).

Shannon also testified to conversations with Roberts that occurred after Roberts was released from prison, but before this motion to disqualify was filed. Shannon testified that his first non-prison meeting with Roberts took place sometime in October of 2017 at a house in Hilliard, Florida, where Roberts was staying. (PCR. 3424-25). During that meeting, Roberts told Shannon about the investigators coming to his house and about his meeting with Caliel at the State Attorney's Office. (PCR. 3425-26). Roberts said more than once during this meeting with Shannon that Caliel had threatened him with perjury. (PCR. 3426-27). Roberts repeatedly asked Shannon whether or not he could actually be charged with perjury. (PCR. 3429; 3431).

Shannon testified that he had a second in-person meeting with Roberts at his house after he was released from prison. (PCR. 3430). This meeting took place a week after the first meeting discussed above. (PCR. 3430). During this second meeting, Shannon, Pafford, and undersigned counsel were present, and Roberts recounted the same version of events he told Shannon the week before. (PCR. 3430). He also reaffirmed his recantation and the affidavit previously given to postconviction counsel while he was still incarcerated. (PCR. 3430). Additionally, he asked Shannon to retain a copy of the voicemails and text messages because he felt threatened by the possibility of a perjury charge and wanted Shannon to have them to corroborate the information he was providing. (PCR. 3430-31). These text messages and voicemails were entered into evidence. (PCR. 1967-69). At the end of this meeting, Roberts once again asked whether he could be charged with perjury. (PCR. 3436-37). Pafford and undersigned counsel both informed him that they were prohibited from giving him any legal advice. (PCR. 3437).

Caliel's claim, that Roberts just wanted postconviction counsel to leave him alone, is simply not credible and should not be relied upon to discount Roberts' statements, which have ample corroboration. Appellee fails to address the fact that this testimony offered by the State to rebut Roberts' recantation primarily comes from Caliel himself, who acted as both witness and prosecutor during the evidentiary hearing, and vouched for his own credibility. The postconviction court never found

that Shannon or Pafford were not credible or had a reason to lie about Roberts' recantation, but simply discounted their testimony as inadmissible hearsay. In contrast, the court relied upon Caliel's testimony to refute this recantation.

In conclusion, the recantation by Roberts is newly discovered evidence which is admissible as an exception to hearsay because it was a statement against interest. Roberts' recantation offers new evidence that was not previously testified to at trial, and he was never cross-examined on this issue. *See Jones*, 678 So.2d at 312-13 (finding that recantation simply offers nothing new because the witness had already been impeached at trial with a prior sworn statement which was consistent with the recantation); *Smith v. State,* 400 So.2d 956 (Fla.1981) (finding that recantation testimony was cumulative to the evidence introduced at trial because both court and counsel were aware that prior to trial the recanting witness had confessed to the crime and said that defendant was not involved). Moreover, Sheppard has demonstrated the trustworthiness of the recantation with corroborating evidence. (PCR. 2312-17; 2450-78; 2524-29). Finally, this newly discovered evidence, as argued above, weakens the case against Sheppard and gives rise to a reasonable doubt as to his culpability

III. THE CIRCUIT COURT ERRED IN FINDING THAT *BRADY/GIGLIO* VIOLATIONS DID NOT OCCUR AT MR. SHEPPARD'S TRIAL CONCERNING MICHAEL ROBERTS AND WILLIE CARTER

A. Michael Roberts

As discussed in ISSUE II *supra*, Roberts' recantation included evidence of a *Brady*/*Giglio* violation by the State. At trial, Roberts testified that he had not been promised anything in exchange for his testimony against Sheppard. (T. 741). However, he also stated that he was trying to find a way to help himself, trying to find a way to get his charges reduced, and was hoping his testimony would be taken into consideration when he was ultimately sentenced on his case. (T. 740-41). Telling is the fact that he "pled guilty to [his] charges over a year" prior to his testimony at Sheppard's trial, as well as the fact that his sentencing had been put off until he could testify in this case. (T. 741; 747). However, as part of his recantation, Roberts stated that he was promised a deal in exchange for his testimony against Sheppard. Specifically, he was told by Caliel that his Duval County case would essentially disappear, which it did, despite the State having DNA evidence against Roberts in that case. (PCR. 2524-29). He was also told by Caliel that he would get assistance on his Nassau and Washington County cases, which he did. (PCR. 2450-66-78).

Sheppard asserts that the lack of a "smoking gun document" evidencing such an agreement is not dispositive of this claim. Considered cumulatively, the following evidence demonstrates proof of a pretrial agreement of assistance in exchange for Roberts' trial testimony against Sheppard: (1) Roberts' testimony that he had pled guilty to his charges over a year prior to Sheppard's trial; (2) Roberts' admission

that his sentencing had been delayed for over a year until he could testify in this case; (3) Roberts' recantation which included the fact that he was promised assistance with his three cases if he testified against Sheppard;[7] (4) documents corroborating that Roberts' Duval County case disappeared, as was promised; and (5) documents showing favorable concurrent deals for Roberts in his Nassau and Washington County cases. *See Wyatt v. State*, 71 So.3d 86, 106-107 (Fla. 2011) (holding that Wyatt failed to show there was an agreement because there was no record evidence that the prosecutor's post-trial letter to the federal government demonstrated proof of a pretrial agreement of assistance in exchange for McCoombs' trial testimony); *See, e.g., Davis v. State*, 928 So.2d 1089, 1115-16 (Fla. 2005)(rejecting defendant's *Brady* claim that the State suppressed information regarding a deal that the State witness would receive gain time for his sentence in exchange for testifying because even though State did in fact write a letter on witness's behalf, there was no evidence that an agreement between the witness and the State was made). In contrast, Sheppard has proved that there was in fact a deal between Roberts and Caliel in exchange for Roberts' testimony. Therefore, Roberts' testimony that there was no deal was indeed false. Roberts knew it was false, as did Caliel.

[7] This recantation is not only in the form of a sworn affidavit from Roberts, but is evidenced through the testimony of Shannon and Pafford, who testified as to Roberts' recantation, which was consistent every time he met with them.

Additionally, Appellee cites to the postconviction court's order finding that evidence presented by Sheppard as to this claim was inadmissible hearsay, and therefore, Sheppard failed to establish either a *Brady* or *Giglio* violation by the State. (AB. 93-94). Sheppard hereby fully incorporates arguments made in ISSUE II regarding the affidavit by Roberts, as well as the testimony of Shannon and Pafford as to Roberts' recantation and his statements that he was, in fact, given a deal in exchange for his testimony against Sheppard. As argued in ISSUE II, Sheppard asserts that this evidence is admissible as an exception to hearsay because it is a statement against interest. This evidence in addition to the court documents corroborating the outright dismissal of charges in one case and the reduced sentences in his other two cases following Roberts' testimony against Sheppard, supports this claim and establishes both a *Brady* and a *Giglio* violation by the State.

IV. THE CIRCUIT COURT ERRED IN FINDING THAT MR. SHEPPARD WAIVED THE CLAIM OF NEWLY DISCOVERED EVIDENCE BY KHALILAH COOK MEJORS AND THAT MR. SHEPPARD WAS OTHERWISE NOT ENTITLED TO RELIEF AS TO THIS CLAIM.

As to this issue, Appellee argues: (1) that Sheppard failed to show that the denial of a continuance was an abuse of discretion that resulted in any undue prejudice to him; and (2) that even if Cook testified at the evidentiary hearing, her testimony would not be sufficient to require relief. (AB. 103).

Appellee claims, "In the context of postconviction proceedings, where the lower court alone examines the evidence, [Sheppard] cannot show that the denial of

the motion for a continuance resulted in any undue prejudice." (AB. 103). The only authority Appellee cites in support of this assertion is a footnote in *Gudinas v. State*, 816 So.2d 1095, 1100, n.5 (Fla. 2002), citing *Kearse v. State*, 770 So.2d 1119 (Fla. 2000), neither of which announce a different standard "within the context of postconviction proceedings".

The postconviction court's denial of the motion to continue in this case was indeed an abuse of discretion because Sheppard suffered undue prejudice by not being able to present this witness at the evidentiary hearing in support of his newly discovered claim. Sheppard relies on his initial brief for discussion of this newly discovered evidence and arguments as to why Cook's testimony requires relief. (IB. 10-11; 104-110).

However, in response to Appellee's arguments concerning abuse of discretion, Sheppard reiterates the fact that the postconviction court found Cook to be a material and necessary witness for the defense. (PCR. 2054-56; 2064-68). And yet denied a request for continuance in order for the court in Tennessee to enforce its subpoena that was properly served on her. *See Beachum v. State*, 547 So.2d 288 (Fla. 1st DCA 1989)(trial court's failure to grant continuance due to witness's absence constituted palpable abuse of discretion in that court found witness to be necessary for proper defense, despite fact that appellant had three months prior to trial to locate this witness yet waited until four days before trial to move for issuance

of a subpoena); *Long v. State*, 668 So.2d 1058, 1059 (Fla. 2d DCA 1996)(holding that a brief continuance should have been granted to the defense so they could check for the defense witness, who was under subpoena); *Mitchell v. State*, 580 So.2d 852, 854 (Fla. 2d DCA 1991)(holding that a continuance should have been granted to allow defendant to locate the witness, where there was an unserved defense subpoena; *Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir.), *cert. denied*, 459 U.S. 878 (1982)(holding that each factor to be considered in determining whether defendant's Sixth Amendment right was denied by denial of continuance to obtain presence of witness weighed in favor of defendant, and thus failure by trial court to grant continuance violated Sixth and Fourteenth Amendment rights to compulsory process); *United States v. Davis*, 639 F.2d 239, 244 (5th Cir. 1981)(holding that a trial judge's discretionary power to deny a motion for continuance is necessarily limited by the Sixth Amendment right to compulsory process and any denial of an accused's attempt to present testimony on his behalf must be weighed against that right). As with all newly discovered evidence claims, the court must consider all of the admissible evidence that could be introduced at a new trial. In doing so, this Court must consider the fact that the only other witnesses to testify at trial regarding a description of the vehicle involved in the shooting at Hollybrook were Cook's cousin Kieva Sherrod, and Dtalya Barrett. Cook's testimony, that she and Sherrod were smoking marijuana at the time they witnessed the shooting, would cast doubt

on the reliability of the identifications made by both Cook and Sherrod, and therefore, Barrett's wavering description of the vehicle would be made to stand alone. Given the inconsistencies in Barrett's description of the vehicle, which is inextricably intertwined with the description of the shooter, and given the evidence that would be admissible at a new trial, this newly discovered evidence from Cook weakens the case against Sheppard and gives rise to a reasonable doubt as to his culpability.

V. THE CIRCUIT COURT ERRED IN FINDING THAT MR. SHEPPARD WAIVED THE *BRADY/GIGLIO* CLAIM REGARDING KHALILAH COOK MEJORS AND THAT MR. SHEPPARD WAS OTHERWISE NOT ENTITLED TO RELIEF AS TO THIS CLAIM.

As with ISSUE IV, Appellee argues that Sheppard cannot show that the denial of the motion for a continuance resulted in any undue prejudice, and that even if Cook testified at the evidentiary hearing, there would not be a reasonable probability that the result of the proceeding would have been different. (AB. 108-09).

As argued *supra* in ISSUE IV, the postconviction court's denial of the motion to continue in this case was an abuse of discretion because Sheppard suffered undue prejudice by not being able to present this witness at the evidentiary hearing in support of his *Brady* and *Giglio* claims. Sheppard relies on his initial brief for discussion of this evidence and arguments as to why Cook's testimony requires relief. (IB. 10-11; 110-115). Moreover, in response to Appellee's arguments

concerning abuse of discretion, Sheppard hereby fully incorporates all arguments made on this issue in ISSUE IV.

Additionally, Appellee argues that any testimony by Cook, regarding the fact that she was not wearing her prescription eyeglasses at the time she witnessed the shooting, fails to satisfy the materiality prong of either *Brady* or *Giglio*. (AB. 109). However, *Kyles v. Whitley*, 514 U.S. 419 (1995), requires that in determining whether evidence not disclosed by the state was "material," in violation of *Brady*, the cumulative effect of all suppressed evidence favorable to the defendant is considered rather than considering each item of evidence individually. Therefore, the analysis in this case would consider the cumulative effect of the *Brady* impeachment information regarding the reliability of Cook's testimony and identification, the *Brady* impeachment evidence of Roberts regarding the deal he was receiving in exchange for his testimony that Sheppard was the shooter, and the *Brady* impeachment evidence of Carter regarding the deal that he was receiving in exchange for his testimony that Sheppard took James' car, which was the subject of the identifications made by Cook, Sherrod, and Barrett. The court must also consider the false testimony that flowed from this suppressed *Brady* evidence and its effect on the jury. When considered cumulatively, this evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the

verdict. *Smith v. State*, 931 So.2d 790, 796 (Fla. 2006)(*quoting Strickler v. Greene*, 527 U.S. 263, 290 (1999)).

VI. THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. SHEPPARD OF A FUNDAMENTALLY FAIR TRIAL

Appellee argues that there cannot be a cumulative error analysis in this case because the postconviction court did not find any deficient performance, suppressed evidence, false testimony, or newly discovered evidence that would probably produce an acquittal on retrial. (AB. 110).

While that may be true, Sheppard asserts that the findings made by the postconviction court, as to all of the individual errors, were not based upon competent substantial evidence, and therefore, the cumulative effect of those errors should have been considered to determine whether those errors were harmless. *See Andres v. State*, 254 So.3d 283, 302-03 (Fla. 2018)(having concluded that multiple errors occurred in this case, we proceed to consider the cumulative effect of those errors to determine whether those errors are harmless); *McDuffie v. State*, 970 So.2d 312, 328 (Fla. 2007)(conducting a cumulative harmless error analysis where multiple errors occurred).

> Harmless error analysis places the burden upon the State, as beneficiary of the errors, to prove there is "no reasonable possibility that the error contributed to" the defendant's conviction. *DiGuilio*, 491 So.2d at 1138. As we have repeatedly stressed, the harmless error 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" but the "focus is on the effect of the error on the trier-of-fact." *Id.* at 1139.

Andres v. State, 254 So.3d 283, 302-03 (Fla. 2018)(*citing Evans v. State*, 177 So.3d 1219, 1238 (Fla. 2015)). It is appropriate to evaluate these claims of error cumulatively to determine if the errors collectively warrant a new trial. *Rogers v. State*, 957 So.2d 538, 553 (Fla. 2007); *Suggs v. State*, 923 So.2d 419, 441-42 (Fla. 2005).

> Where multiple errors are found, even if deemed harmless individually, "the cumulative effect of such errors" may "deny to defendant the fair and impartial trial that is the inalienable right of all litigants." *Brooks v. State,* 918 So.2d 181, 202 (Fla.2005) (quoting *Jackson v. State,* 575 So.2d 181, 189 (Fla.1991)); *see also McDuffie v. State,* 970 So.2d 312, 328 (Fla.2007).

Hurst v. State, 18 So.3d 975, 1015 (Fla. 2009).

The cumulative effect of numerous errors may constitute prejudice. *State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996).

> A number of [defendant's] other penalty phase claims relating to ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 (1984). However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of [defendant's] counsel.

Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995)(quoting *Harvey v. Dugger*, 656 So.2d 1253, 1257 (Fla. 1995)).

Furthermore, this Court considers the cumulative effect of evidentiary errors and ineffective assistance claims together. *State v. Gunsby*, 670 So.2d 920, 924 (Fla.

1996)(granting new trial on the basis of the combined effect of newly discovered evidence, the erroneous withholding of evidence, and ineffective assistance of counsel); *see also Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005)(in conducting its cumulative error analysis, the postconviction court took into consideration all claims, including allegations of *Giglio*, *Massiah*, and *Brady* violations, and claims of newly discovered evidence and ineffective assistance of counsel). Therefore, all the errors contained in Sheppard's appeal, including claims of ineffective assistance of counsel, *Brady*, *Giglio*, newly discovered evidence, should be considered cumulatively.

Thus, it is incumbent upon this Court to conduct a cumulative error analysis if it finds that multiple errors occurred in this case, as argued by Sheppard. *See State v. Woodel*, 145 So.3d 782, 801-03 (Fla. 2014) (where cumulative error analysis was conducted on appeal from postconviction motion, despite neither party having raised the issue on appeal, and despite the postconviction court finding it unnecessary to perform a cumulative assessment of alleged trial counsel errors).

CONCLUSION AND RELIEF SOUGHT

Sheppard respectfully requests this Honorable Court reverse the postconviction court's denial of his 3.851 motion and remand for a new guilt phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished via electronic service to Michael Kennett, Assistant Attorney General, on this 10th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Times New Roman 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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