IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2149

JAMES AREN DUCKETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

Mr. Duckett continues to rely upon the Statement of the Case and Facts contained in the Initial Brief. However, a few brief points should be made regarding the Statement of the Case in the Answer Brief.

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 fifty-four 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 as set out on pages 1-19 of Duckett's brief is argumentative and is denied" (Answer Brief at 1). There is no citation to or explanation of where in the Initial Brief the statement was argumentative or the areas of disagreement.

Mr. Duckett will attempt to explain any specific disagreements he has with the State's Statement of Facts in

this portion of the brief or in the particular claims to which the evidence is relevant.

The Statement of the Case and Facts in the Answer Brief recites this Court's findings of fact from the direct appeal which includes the stricken testimony of Williams rule witness Kim Ruetz (Answer at 1-5). Mr. Duckett objects to the inclusion of these facts as it includes evidence which was stricken from the record and should not be considered in evaluating the claims in this appeal. Furthermore, Mr. Duckett objects to any argument by the State that these are the appropriate facts upon which to base a review of any allegations of Brady, ineffective assistance of counsel or newly discovered evidence. Caselaw dictates that all errors be examined under a cumulative error analysis and that such analysis include both the evidence presented at trial *and* the subsequent evidence produced in post-conviction. *See* Roberts v. State, 2002 WL 31719355 *8 (Fla. Dec. 5, 2002).

The State attempts to summarize the testimony of the evidentiary hearing witnesses in the Statement of Facts (Answer at 6-54) but at times leaves out relevant portions of testimony that would more accurately portray the

evidence. As noted above, Mr. Duckett will address those individual errors in the body of the brief. As much of the evidence in this case is interrelated and therefore the nuances of the testimony of witnesses is critical, Mr. Duckett urges the Court to independently read the witness testimony. Mr. Duckett notes for the Court that the witnesses discussed on pages 6-15 of the State's Answer were actually testifying in a hearing concerning the Open Records requests made pursuant to Chapter 119. Thus, their testimony is limited to what if any records they generated or controlled in the course of the case.

The State does not address the lack of review by the circuit court which is evidenced by its wholesale adoption of the State's post-hearing memorandum replete with errors, as the final order of the court. Mr. Duckett continues to assert that this adoption indicates a failure of the circuit court to fully and independently consider the issues in Mr. Duckett's Rule 3.850 motion. Thus, this Court should accord no deference to the circuit court order.

ARGUMENT IN REPLY

ARGUMENT I

INTRODUCTION

The State's Answer Brief is notable in its refusal to address authority contrary to the State's position even though the contra authority was set forth in the Initial Brief. The most glaring omissions are the cases that define the cumulative analysis that is dictated by this Court and the United Supreme Court when evaluating issues of ineffective assistance of counsel, Brady and newly discovered evidence. Nowhere in the State's brief does it cite Kyles v. Whitley, Strickler v. Greene or Williams v. Taylor, three leading cases on the review that must be done by this Court. By not talking about these cases, the State is relieved of the burden of discussing the cumulative analysis review in which this Court must engage. As Mr. Duckett argued in his Initial Brief and argues *infra*, a cumulative analysis review of the issues in Claim I of his brief, and in the rest of his brief, mandates a new trial and sentencing.[1]

A. GWEN GURLEY

[1]The State contends that by pleading alternative theories, Mr. Duckett indicates a lack of confidence in any of the them, and relies upon Jones v. Barnes, 463 U.S. 745 (1983), as support for this argument (Answer at 57). Of course Jones simply holds that an attorney is not required to plead all non-frivolous claims on behalf of a defendant, a holding which has no bearing at all on this case.

Mr. Duckett contends that due process was denied when the state's key witness at trial, Gwen Gurley, lied about seeing Ms. McAbee get in Mr. Duckett's car. In Response to this Argument, the State block quotes the circuit court findings on this issue and provides very little independent argument (Answer at 58-59). The State does assert that the standard of review is abuse of discretion. The State also argues that Gwen Gurley was not an important witness as she was not mentioned in the direct appeal opinion.

1. The Standard of Review

Mr. Duckett disagrees with the State's contention that the circuit's denial of this portion of the claim is subject to the abuse of discretion standard of review. Specific findings of historical fact in the circuit court's resolution of Brady, ineffective assistant of counsel and newly discovered evidence claims following an evidentiary hearing are reviewed deferentially on appeal. However, this Court is only required to accept factual determinations made by the circuit court after an evidentiary hearing if they are supported by competent and substantial evidence. *See* Shaw v. Shaw, 334 So.2d 13, 16 (Fla. 1976). The legal determinations, on the

other hand, are reviewed de novo. For the reasons noted *supra*, Mr. Duckett asserts that the factual determinations of the circuit court are not supported by competent and substantial evidence and should not be accorded deference by this Court.

2. Gwen Gurley Was The State's Key Witness

The State's assertion that Gwen Gurley was not a critical witness is contrary to the State's position that was taken throughout the trial and direct appeal and contrary to the record. Counsel for the State at trial argued that "[Gwen Gurley's] testimony is *material and necessary to a just determination of guilt of innocense* (sic) in this case" (Motion to Perpetuate Testimony, April 13, 1988, T. 2323, emphasis added). Almost one sixth of the State's opening argument was devoted to Ms. Gurley's role in this case, discussing in detail how she saw Mr. Duckett circle around the block and return to the Circle K to pick up Ms. McAbee after he had driven off (R. 472-474). The State continued to argue her testimony in the closing argument (R. 1900) and in its rebuttal argument (R. 1950-52). Trial counsel noted in post-conviction that Ms. Gurley's testimony was the most critical testimony in the trial (PC-R. 975) as she was the only one who placed Ms.

McAbee in Mr. Duckett's car. And in its brief on direct appeal, the State argued that Mr. Duckett enticed Ms. McAbee to get into his car and drive off, an assertion that was made by no one but Gwen Gurley.

The State continues to put forth the argument, submitted in its post-hearing brief and adopted by the circuit court, that the result of the trial would have been the same without Ms. Gurley. As noted in the Initial Brief, whether the verdict would have been the same is not the appropriate question under any standard (Initial Brief at 32-34). If the Court finds that the testimony was false and misleading, Mr. Duckett need only show that there is a reasonable likelihood that this testimony could have affected the outcome, a burden which he can easily meet. *See* United States v. Bagley, 473 U.S. 667 (1985). But even if this Court feels that the newly discovered evidence standard is the appropriate test, the question is whether a new trial is warranted if the previously unknown evidence would probably produce an acquittal. Jones v. State, 709 So. 2d 512 (Fla. 1993); Kyles v. Whitley, 514 U.S. 419 (1995).

3. State's Failure To Address Other Evidence Concerning Gwen Gurley's False Testimony

Neither the State nor the circuit court address the bulk of evidence concerning Ms. Gurley's false testimony that is detailed throughout the Initial Brief. No mention is made of the two witnesses who were with her on the night in question, both of whom assert that Ms. Gurley was not at the Circle K at the time she testified (PC-R. 1331; 1402). No mention is made of the uncontroverted post-conviction testimony of Vickie Davis that Gwen Gurley told her she needed to lie about what happened that night (PC-R. 1326). No mention is made of Vickie Davis' testimony that she was coached on what to say during a taped interview of her and Ms. Gurley by the sheriff's office (PC-R. 1329-31; *see also* D. Exh. 8 - Taped Statement of Vickie Davis, October 28, 1987). No mention is made of the fact that not one of the eight witnesses who were at the Circle K when Mr. Duckett was there and who gave statements and/or testified concerning who or what they saw that night mentioned seeing Ms. Gurley, Ms. Davis or Mr. Gaitan at the Circle K that night (PC-R. 1407-09). And no mention is made of the ever changing statements Ms. Gurley gave pre-trial, which changed even further when she testified, and which were not countered by trial counsel in any manner.

Additionally, neither the State nor the circuit court address the issue of Ms. Gurley's early release from jail (D. Exh. 38, 39), exactly what she told Ms. Davis she hoped to achieve if she lied and said she saw Ms. McAbee get in Mr. Duckett's car (PC-R. 1326).[2]

4. The Circuit Court's Credibility Finding

The circuit court's finding (and the State's apparent reliance upon said finding) that Ms. Gurley's recantation is "inconsistent, incredible and unreliable" is not supported by the record.[3] There was no recantation to find inconsistent, incredible and unreliable. When Ms. Gurley took the stand in the post-conviction proceedings, she was prohibited from recanting by the State's threat of a perjury conviction. Despite a request by the circuit court to the State to grant Ms. Gurley immunity, the State refused to do so. Because of the fear of prosecution, Ms. Gurley invoked her Fifth Amendment rights and remained silent. The State

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[2]Mr. Duckett has not reiterated every error with respect to Ms. Gurley's false testimony which are fully brief in his Initial Brief (*see gen.* Initial Brief at 23-32).

[3]Mr. Duckett continues to assert the State knowingly presented the false testimony of Ms. Gurley and withheld critical impeachment evidence from the defense, in violation of Bagley, Giglio, and Brady, and thus the appropriate review of this claim is de novo review. Mr. Duckett does not waive that position by addressing the circuit court's finding that this evidence is newly discovered evidence.

fails to address the issues concerning the new perjury laws and its application to Ms. Gurley in this case.

With the exception of the statement made to Mr. Ridgeway, the circuit court erroneously excluded Ms. Gurley's prior recantations as hearsay (Answer at 58).[4] Although the circuit court found that Ms. Gurley's recantations were newly discovered evidence governed by Jones v. State, 709 So. 2d 512(Fla. 1998), neither the circuit court nor the State addressed the issue raised in Jones about the applicability of Fla. Stat. § 90.804 to Ms. Gurley's prior statements. Unlike the witness who recanted his testimony to others in Jones, Ms. Gurley was unavailable as a witness and her testimony properly should have been admitted as an exception to the hearsay rule. *See* Fla. Stat. § 90.804(1)(b) and (2)(c); *see also* Jones v. State, 709 So. 2d at 524 (declarant must be unavailable as a witness for hearsay testimony to be admissible as

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[4]As noted in the Initial Brief, it is telling that the only statement the circuit court finds is not hearsay is the alleged recantation of the recantation. Unlike the recantation of her trial testimony, this statement lacks no corroboration, no detail and no independent indicia of reliability. Mr. Duckett asserts that this finding in the circuit court order is a direct result of the State drafting the order, rather than the court affording the independent review mandated by Florida and United States Supreme Court law and the Florida and United States Constitutions.

declaration against penal interest). As noted *infra* and throughout the Initial Brief, Mr. Duckett presented a wealth of corroborating evidence to support the trustworthiness of these statements.[5]

B. UNRELIABILITY OF FORENSIC EVIDENCE

The State appears to argue that this issue should be rejected because this Court rejected a sufficiency of the evidence claim on direct appeal (*see* Answer at 59-60). If this is in fact the State's position, and it is difficult to ascertain because the State simply block quotes from the direct appeal, then this position is wrong.[6] Clearly, this Court must independently review the errors alleged in this appeal and determine if relief is warranted. Additionally, the case law dictates that this Court must do a cumulative error analysis that includes not only the evidence adduced in post-conviction, but also the evidence that was presented

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[5]Common sense dictates the result in this case. What possible motive could Gwen Gurley have to take the stand in post-conviction and remain silent? If she were in fact telling the truth at trial, would it not be easier to take the stand, confirm her trial testimony and thereby avoid any risk of prosecution? Instead, she took the stand and asserted her right to remain silent.

[6]It is unclear to Mr. Duckett why the State is arguing the sufficiency of the evidence issue because that is not the claim he has presented in his Initial Brief.

at trial. *See* Roberts v. State, 2002 WL 31719355 *8 (Fla. Dec. 5, 2002); Kyles

1. The Hair

Mr. Duckett disputes the State's assertion that this issue turns upon the credibility of witnesses and is reviewed for an abuse of discretion (Answer at 60). Although there are several components to the hair evidence, the issues raised by each of these components are legal ones. The appropriate review is de novo.

The State contends that the fact that the FBI could do a test that the FDLE could not do does not generate a basis for relief (Answer at 61).[7] This claim both misstates the evidence and misstates the legal issue. The tests conducted by the FBI on the hair were the same tests that were conducted by the FDLE. The only difference was the results. Malone's false testimony concerning his knowledge of the prior testing, is a violation of Mooney v. Holohan, 294 U.S. 103 (1935) and Giglio v. United States, 405 U.S. 150 (172), and is reviewed de novo. Likewise, the State's

[7]The State asserts that this claim was not raised in the Rule 3.850 motion and thus was not before the trial court (Answer at 60, 61 n.2). Pursuant to Florida law, Mr. Duckett broadly pled his Rule 3.850 motion and conformed his pleadings to the evidence following the evidentiary hearing on this issue. This issue was fully pled and litigated in the court below and is properly before this Court.

nondisclosure of evidence concerning the expert shopping is a violation of Brady and Kyles as it would have provided valuable impeachment evidence to defense counsel, and as such is also reviewed de novo.

a. Malone is Not Credible.

The State's assertion that the Department of Justice's report is irrelevant (Answer at 61) fails to address the report's discussion of Malone's prior false testimony.[8] The State's approach to this issue in the evidentiary hearing was similar when they called Malone's supervisor, Robert Murch, to rebut Mr. Duckett's assertions. Mr. Murch simply testified that Malone was a proficient examiner and never once stated that he was credible or testified truthfully in the Hastings matter. To the contrary, Murch admitted that Malone was found incredible by the Office of the Inspector General. The State also fails to address any of the cases

[8]The State argues that the circuit court correctly denied relief when it relied upon Davis v. State, 24 Fla. L. Weekly S260 (June 1999), for support that the attack on Malone was unfounded and without merit. Davis stands for no such proposition, and does not mention Malone. The defendant in Davis requested an evidentiary hearing and stay of execution to explore the possibility that the mention of his expert (not Malone) in the OIG report might mean he did wrong. This Court denied because the OIG report failed to mention any wrongdoing of Davis' expert. The contrary is true in Mr. Duckett's case where the OIG report specifically finds Malone presented false and incredible testimony.

outlined in the Initial Brief where Malone's credibility has been called into question. This issue will not disappear simply because the State ignores it. As defense counsel tried to show at trial and on direct appeal, Malone is not a credible witness and should not have been allowed to testify as an expert at trial.[9]

2. Tire Tracks

The State asserts that Mr. Duckett has shown neither deficient performance nor prejudice with respect to the tire tracks because he failed to present the evidence that he accused trial counsel of failing to present (Answer at 62-63).[10] The State neglects to mention the testimony of Mascotte Chief of Police Michael Brady. Brady testified that Gary Nelson initially stated that the tire track he had lifted from the scene matched the chief's vehicle then immediately changed his position and stated that it matched the tires on the marked unit, despite the fact that these

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[9]The State continued to violate Brady when it argued on the direct appeal that Malone was a credible witness and failed to turn over the information that Malone had testified falsely in the Hastings matter.

[10]The State makes this argument with respect to several of the subclaims in Argument I. Rather than address the argument in each subclaim, Mr. Duckett will address them all in conclusion at the end of the claim.

two cars had different tires and that neither of these were the car James Duckett had been driving on the night of May 11, 1987 (PC-R. 1197-98).[11] Michael Brady also testified that he returned to the scene later in the day after the body had been removed and the crime scene tape taken down and found traces of plaster from the tire molds outside of the crime scene perimeter (PC-R. 1194).[12] Trial counsel had no tactical reason for failing to pursue and present this evidence and failure to do so constituted deficient performance which prejudiced Mr. Duckett.

3. The Fingerprints

Much like the response to the issue concerning the tire tracks, the State asserts that no additional information concerning the fingerprints was presented at trial. The State fails to address the differences in Mervin Smith's testimony from that presented by the State's trial

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[11]This is in contrast to the trial testimony of state witness Terrell Kingery, who performed the examination on the tires, who testified that he only compared the unknown prints to the tires on Mr. Duckett's car and that he did not compare them with any other known tires including those on the other police car (R. 1098, 1100, 1103). Had trial counsel interviewed Mr. Brady, he would have been able to impeach this evidence.

[12]Mr. Brady further testified that he told trial counsel this information and that trial counsel indicated he would call him for a subsequent court hearing, but that he was never contacted (PC-R. 1198).

witnesses, Ahern and Aleno. Ms. Ahern testified to the position of Ms. McAbee when she put the prints on the car (R. 1189-91) and testifies that the prints were placed on the car when Ms. McAbee was scooting across the hood (R. 1194-1195). Ms. Ahern, over the objection of counsel, Ms. Ahern jumped up on the hood of the car to demonstrate that position for the jury (R. 1194). Deputy Randy Aleno, who is not an expert in fingerprint analysis, testified that when he dusted the hood of Mr. Duckett's car for prints they came up dark indicating they were fresh prints (R. 882).

Former FBI latent print examiner Mervin Smith was available to testify and could have provided valuable evidence to contradict the State's theory. Mr. Smith could have explained to the jury that the darkness of the print was no indication of the age of the print, but was rather an indication on the amount of oil on the surface of the print (R. 1076) He could also have explained that it was impossible to tell if the person who left the prints was standing, sitting or leaning on the car (PC-R. 1071). Mr. Smith disputed Ms. Ahern's testimony that Ms. McAbee would have had to have been sitting on the hood to leave her prints in the position in which they were found (PC-R. 1069-70). Mr. Smith also testified that smooth surface skin that

has hair and sebaceous glands will also leave a mark that is detectable by dusting (PC-R. 1074-75). Contrary to the State's position that Mr. Duckett has presented nothing additional in post-conviction, a significant amount of both substantive and impeaching evidence was presented and would have been available at trial.

4. The Pencil

The State continues with the same argument with respect to the pencil and asserts that nothing additional was presented by Mr. Duckett with respect to the pencil (Answer at 64). The State's position ignores the testimony of former Florida Department of Law Enforcement examiner Dale Nute. Mr. Nute ran a series of examinations on a pencil similar to that one found at the crime scene and found that a pencil left in the elements for as many days as alleged by the State would have shown some evidence of discoloration (PC-R. 290-91). Mr. Nute also testified that an examination of the pencil with an ultraviolet light will detect discoloration on a pencil left in the sun for as little as two or three days (*Id.*).

B. (sic) - WILLIAMS RULE

In response to this argument, the State discusses this Court's ruling on direct appeal and argues that the issue is procedurally barred because it has previously been litigated (Answer at 64-66). Mr. Duckett requested permission from the circuit court to relitigate the issue and was denied, and Mr. Duckett maintains that ruling was in error. But the State is in error when it asserts that the issue in Mr. Duckett's Initial Brief has previously been litigated.

The argument concerning the Williams rule witnesses on direct appeal was a purely legal challenge to the admission of these witnesses pursuant to Williams v. State, 110 So. 2d 654 (Fla. 1959)(*See* Amended Brief of Appellant, April 7, 1989, pp. 13-16). Mr. Duckett argued in his Rule 3.850 motion and subsequent proceedings and in his Initial Brief that trial counsel was ineffective for failing to adequately counter the Williams rules witnesses.[13] The State fails to address the arguments presented in the Initial Brief and Mr. Duckett will rely upon those arguments as stated.

C. CRITICAL EVIDENCE NOT PRESENTED TO JURY

[13]Not only did trial counsel fail to properly investigate these issues and to adequately impeach these witnesses, he actually requested that the courtroom be cleared prior to Ms. Ruetz' testimony, contrary to Florida law that the courtroom cannot be cleared absent a showing of necessity.

The State asserts that the circuit court "implicity denies" this claim (Answer at 66). Necessarily absent from this contention is a citation to the court's order as the court simply did not consider any of this information. Likewise, the State fails to address the substantive issues presented to the Court and simply asserts that this is another issue of ineffectiveness which cannot meet the Strickland standard (Answer at 66).

D. EVIDENCE CORROBORATING MR. DUCKETT'S VERSION OF EVENTS

The State makes the same argument with respect to this claim as it makes to previous claims, *i.e.* that it cannot meet the Strickland standard. As with the other claims, that issue will be addressed below.

E. CUMULATIVE ERROR ANALYSIS REQUIRES RELIEF

As noted above, rather than address the cumulative error analysis which is argued in the Initial Brief and required by law, the State simply asserts that no individual error can meet the Strickland prejudice requirement. Apparently the State believes that if two ineffective assistance of counsel claims or two Brady claims are

separately found meritless, no cumulative consideration is required. However, this position was specifically rejected in Kyles and in Lightbourne v. State, 742 So. 2d 238 (Fla. 1999). Even in Jones, this Court considered the cumulative effect of all the claims that had separately been found to be without merit. Cumulative analysis is required and was not conducted here.

In conducting cumulative consideration of Brady material, the analysis must look to the undisclosed evidence and how trial counsel may have used the evidence to undermine the State's case. Here, Mr. Duckett maintained his innocence at trial and testified that he was not the person responsible for Ms. McAbee's death. The jury was presented with a credibility determination: should it believe the State's witnesses or should it believe Mr. Duckett. As noted by trial counsel in the direct appeal, the evidence was entirely circumstantial. This is not a case where no amount of evidence could have changed the balance. Clearly, the evidence that Gwen Gurley, the only person who placed Ms. McAbee in Mr. Duckett's car, was lying would have undermined the State's case. And this is only one of the errors present at Mr. Duckett's trial.

This Court recently further explained the Kyles requirement of cumulative analysis. In Roberts v. State, the Court addressed the issue of cumulative analysis with respect to newly discovered evidence. The Court said:

> Finally, we agree with Roberts that our case law requires cumulative analysis of newly discovered evidence. In determining whether newly discovered evidence warrants setting aside a conviction, a trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial to determine whether the evidence would probably produce a different result on retrial. *See* Lightbourne v. State*,* 742 So.2d 238, 247 (Fla.1999); *Jones v. State,* 709 So.2d 512, 521 (Fla.1998). This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Lightbourne*,* 742 So.2d at 247.

Roberts v. State, 2002 WL 31719355 *7(Fla. Dec. 5, 2002). Based upon this decision and well settled United States Supreme Court law, a cumulative analysis which takes into account all of the errors asserted by Mr. Duckett in his briefs to the Court, evaluated in conjunction with the evidence which was introduced at trial, is required. Such an analysis mandates a new trial.

ARGUMENT VI

A. VAGUE JURY INSTRUCTIONS

Mr. Duckett argued that the jury instructions in his case violated the principle enunciated in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) (Initial brief at 90). Since Mr. Duckett's Initial Brief was filed, the United States Supreme Court decided Ring v. Arizona, 122 S. Ct. 2428 (2002), holding that Apprendi applies to capital sentencing and overruling Walton v. Arizona, 497 U.S. 639 (1990). Ring fully supports Mr. Duckett's argument.

The State asserts that Apprendi has nothing to do with jury instructions and that Florida does not make the eligibility for death determination at the penalty phase of a capital trial (Answer at 74). Both of these statements are wrong. As noted *infra*, Ring clearly holds that Apprendi applies to capital sentencings. The vague jury instructions on aggravating factors removed the necessary tools from the jury to assess the facts that increased the potential penalty from life to death in violation of Apprendi and Ring.[14]

[14]Appellant does not concede that adequate jury instructions would wholly cure the problems inherent in Florida's sentencing scheme. As noted elsewhere in this brief and in Mr. Duckett's Petition for Writ of Habeas Corpus and Reply, a procedure which provides a jury "recommendation" without any factual findings as to which aggravating factors

The State's argument that a conviction of first-degree murder in Florida renders the defendant eligible for a death sentence ignores the difference between "form" and "effect" explained in Apprendi, 530 U.S. at 482-83, and Ring, 122 S. Ct. 2440-41. The dispositive point is that a Florida defendant convicted of first-degree murder is not eligible for a death sentence until additional findings are made. If sentence were to be imposed immediately upon conviction of first-degree murder, the only sentence which could even be *considered* is life imprisonment.

B. THIS CLAIM IS PROPERLY BEFORE THE COURT.

The State assertion that this claim is procedurally barred (Answer at 72) is flawed for several reasons. With respect to the vague instructions which rendered the jury unable to make the factual determinations in the sentencing phase, the Court's precedent dictates that the Court entertain this claim. *See*, *e.g.*, Thompson v. Dugger, 515 So. 2d, 173, 175 (Fla. 1987), holding that the Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), "represent[ed] a sufficient change in law that

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the jury found unanimously and without indicating whether the jury found "sufficient" aggravating factors beyond a reasonable doubt and without necessary Sixth Amendment procedures violates Ring and Apprendi and the Sixth Amendment.

potentially affect[ed] a class of petitioners...to defeat the claim of a procedural default." Apprendi and Ring cannot conceivably be regarded as less drastic, fundamental or sweeping changes of law than Hitchcock.

With respect to the improper finding of the heinous, atrocious or cruel aggravator, the ineffective assistance of counsel excuses the procedural bar. Trial counsel's failure to adequately preserve this issue for review constituted deficient performance. Although trial counsel objected to the aggravating factor of heinous, atrocious or cruel at trial (R. 2018), he made no argument to support his objection. There can be no tactical reason for failing to provide support to a valid objection at trial. Secondly, trial counsel conceded in post-conviction that his failure to obtain the services of a pathologist who would refute the state's case that Ms. McAbee drowned was error (PC-R. 1006-1007). His omission prejudiced Mr. Duckett by failing to adequately counter the state's case that the facts supported a finding of this aggravator. Contrary to the assertions of the State that the pathologist who testified in post-conviction did little to counter the testimony at trial (*see*

Answer at 67), the picture is vastly different than that painted by the state's witnesses at trial.

Dr. Arden testified that the finding that the cause of death was both drowning and strangulation was not supported by the facts of the case and that the true cause of death was solely strangulation (PC-R. 1099). This is an important distinction as the State asserted through witnesses and in argument at trial that Ms. McAbee was necessarily alive between being strangled and thrown in the lake. More importantly, in response to a question from the court, Dr. Arden testified that there was no swelling in the neck to indicate Ms. McAbee was alive for even a short time after being strangled (PC-R. 1111-1112).

This evidence is in direct contrast to the argument and evidence presented at trial which supported a finding of this aggravator (*See* R. 485, 804, 810). In the written sentencing order, the trial court made specific findings that the evidence showed Ms. McAbee did not die immediately and that Ms. McAbee was conscious for several minutes after the strangling began and before being thrown into the lake (R. 2242). The court relied upon these facts to support the

heinous, atrocious or cruel aggravator (R. 2243-44).[15] Because trial counsel failed to adequately present evidence and counter the state's case, the court and jury were left with incorrect information.

The State asserts in the introduction that this Court has found, in Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990), *vacated on other grounds*, that strangulation is per se heinous, atrocious or cruel (Answer at 26, n. 5). In fact, the Court made no such finding in Hitchcock and instead looked at the particular facts of the case to determine if the aggravator was valid. Although the Court noted that the defendant in Hitchcock had stated in his brief that "[s]trangulations are nearly per se heinous", the Court considered the amount of suffering by the victim in that particular case prior to determining whether the aggravator was supported. Likewise, in all of the cases cited by the Court in support of this finding in Hitchcock, the Court looked at the particular facts of each of those cases and noted that each of the victims suffered prior to

[15]It is unclear from the record how many if any of the jurors found this aggravator or whether that finding was unanimous, as the jurors simply indicated that they recommended a sentence of death by a vote of 8 to 4 (R. 2442). Appellant asserts that this was a clear violation of the holdings in Apprendi and Ring.

their death before the Court determined that the aggravator was supported.[16]

Petitioner asserts that a similar examination of the facts in this case will result in a finding that the aggravator is not supported by the record. Trial counsel's failure to adequately litigate this issue prejudiced the defendant and resulted in a death sentence. Without this aggravator, the death sentence must fall. *See* Rembert v. State, 445 So. 2d 337 (Fla. 1984) (in the course of a felony cannot support a death sentence by itself). Sentencing phase relief is appropriate.

ARGUMENT VII

The jurors in Mr. Duckett's case were repeatedly told both by the State and through the judge's instructions that they were not responsible for the penalty phase verdict (*See* Initial Brief at 92). These admonitions are contrary to the holdings in Ring and Apprendi. A jury in a capital sentencing is responsible for all elements that increase the potential maximum sentence. The arguments and instructions in Mr. Duckett's case which diluted the jury's sense of responsibility are in clear violation of Ring and Apprendi.

[16]In each cited case, the Court noted that the victim had suffered considerably prior to unconsciousness and/or death.

The State urges this Court to impose a procedural bar with respect to this claim based upon well-settled Florida law (Answer at 74). Regarding Ring claims, the rule followed by this Court has been to address the claims on the merits in successive post-conviction cases. *See* Bottoson v. Moore; King v. Moore; Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002); King v. State, 808 So. 2d 1237 (Fla. 2002); Mills v. Moore, 786 So. 2d 532, 536-37 (Fla. 2001). In Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002), the Court cited the decision in the successive habeas case of Mills v. Moore for the proposition that the claim was "meritless." In these rulings, this Court has rejected the State's argument that such claims may be procedurally barred.

CONCLUSION

For the reasons stated in this brief and in his Initial Brief, Mr. Duckett respectfully urges this Court to vacate his conviction and order a new trial as to Argument I, and order his immediate release if the state fails to retry him within a reasonable period of time. As to the remaining

arguments, he asks that his death sentence be vacated and his case remanded for a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Reply Brief of Appellant has been first class mail, postage prepaid, to Kenneth Nunnelley, Office of the Attorney General, 444 Seabreeze Blvd, Floor 5, Daytona Beach, Florida 32118-3958, on December 11, 2002.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Reply Brief of Appellant complies with the font requirements of Fl. R. App. P. 9.210(a)(2) typed in Courier New, 12 point type, not proportionately spaced, this date, December 11, 2002.

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