**IN THE SUPREME COURT OF FLORIDA**

**NO. SC01-2862**

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**ROGER LEE CHERRY,**

**Petitioner,**

**v.**

**MICHAEL W. MOORE,**
**Secretary, Florida Department of Corrections,**

**Respondent.**

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# REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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## INTRODUCTION

**COMES NOW**, the Petitioner, **Roger Lee Cherry**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Cherry's Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue and argument, however does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

## CLAIM I

**MR. CHERRY'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE WAS DEPRIVED OF AN INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.**

The State argues that this claim is "merely a variant" of the claim Mr. Cherry raised in his motion to vacate, which alleged that he received ineffective assistance of penalty phase counsel. However, the State misses the true issue, which is that the law in this case has changed and errors have occurred in the appellate process. The instant issue arose from the contradictory manner in which the Court has resolved issues on Mr. Cherry's direct appeal and then on his appeal from the lower court's denial of postconviction relief.

On direct appeal, appellate counsel argued that the trial court erred by failing to consider a four-page psychiatric report

of Dr. Barnard that trial counsel introduced during Mr. Cherry's penalty phase. However, the Court deemed this claim "meritless" and declined to address it on direct appeal. See Cherry I, 544 So. 2d at 187. Nevertheless, in assessing the weight of the aggravators, the Court said that there was an "absence of any mitigating factors."[1] See Cherry I, 544 So. 2d at 188.

After a three-day evidentiary hearing, at which Mr. Cherry presented several mitigation witnesses and evidence which is recognized as compelling mitigation, this Court held that "most of the testimony now offered by Cherry is cumulative to that stated in Dr. Barnard's report." See Cherry III, 781 So. 2d at 1051. This Court's ruling that the evidence and testimony from the penalty phase was "cumulative" relies on the fact that there was mitigation presented during Mr. Cherry's penalty phase. However, this most recent holding, that there was mitigation, contradicts the Court's direct appeal opinion that there was an "absence of any mitigating factors." See Cherry I, 544 So. 2d at 188.

The Court based its finding that the evidence was cumulative, in part, on the fact that the trial court instructed the jury on three statutory mitigators: the crime for which Mr. Cherry was to be sentenced was committed while he was under the

[1] The State also took the position that "[t]he trial judge in the instant case found . . . no mitigating circumstances." (Answer Brief at 40-41) (Attachment A).

influence of an extreme mental or emotional disturbance; he acted under extreme duress or under the substantial domination of another person; and, Mr. Cherry's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired.[2] See Cherry III, 781 So. 2d at 1051. This Court reasoned that because the jury was given these instructions they found the statutory mitigators, thus any evidence at the evidentiary hearing offered to prove the mitigators was cumulative. However, during Mr. Cherry's direct appeal, the State argued that, despite being given these instructions, the jury had no information on which to find any mitigating circumstances:

> Although the court charged the jury with these statutory mitigating circumstances, the defense presented no evidence in support of them during the penalty phase, nor did anything that came out during the guilt phase support them. The defense did introduce a psychiatric report prepared by Dr. Barnard (R. 1166-69), which included a family history that Cherry's father had a bad temper and beat the defendant severely, but there was no testimony to substantiate or elaborate on that family history, not even from Cherry. Neither was there any lasting detrimental effect on Cherry. . . . [T]he trial court did not err in failing to find that the appellant's unattested-to history of being beaten by his father rose to the level of a non-statutory mitigating circumstance.

(Answer Brief at 38) (Attachment A). On Mr. Cherry's direct

[2] The jury was also instructed that they could consider any aspect of Mr. Cherry's character.

appeal, this Court affirmed the State's argument that the mitigation was not established.

During his evidentiary hearing, Mr. Cherry presented the testimony and witnesses that the State suggested were necessary to establish mitigation, such as "witness [who] provided specific instances of abuse." See Cherry III, 781 So. 2d at 1051. Furthermore, based upon the abundant information presented at the hearing, Dr. Barnard found the nonstatutory mitigator of child abuse. See Cherry III, 781 So. 2d at 1045 (citing the circuit court's order denying postconviction relief). Despite the probability that the jury did not find the statutory mitigators existed because they were "unattested-to," this Court inexplicably changed the law of the case and concluded that the testimony and evidence which established the mitigators at the evidentiary hearing was cumulative.[3]

Additionally, this Court recognized that at the hearing Mr. Cherry presented two "unrefuted factors . . . that were not offered during the penalty phase": (1) his history of alcohol and substance abuse and (2) his borderline retardation. See Cherry III, 781 So. 2d at 1051. Even so, this Court found that these two factors were not "sufficiently weighty" to overcome the aggravators. See Cherry III, 781 So. 2d at 1051.

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[3] The prejudice to Mr. Cherry is that two different conclusions have been reached by this Court in order to defeat his constitutional claims of error.

Though the two factors alone may not be enough to overcome the aggravators, Mr. Cherry's substance, his borderline retardation, his child abuse, and the statutory mental mitigators would have outweighed the aggravating factors. Mr. Cherry was undisputably prejudiced by trial counsel's failure to present this evidence, because, as the State conceded during Mr. Cherry's direct appeal, neither the jury nor the judge found any mitigators to weigh against the aggravators.

Essentially, the law of this case has changed. First, the Court found no mitigation but now has deemed that three days of mitigation evidence and testimony is cumulative to the mitigation from trial. By receding from its initial finding that there was no mitigation, this Court implies that the direct appeal opinion in Mr. Cherry's case was erroneous and Mr. Cherry has been denied due process in his appellate proceedings.

"This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case." Owens v. State, 696 So. 2d 715, 720 (Fla. 1997); see also, Preston v. State, 444 So. 2d 939, 942 (Fla. 1984), vacated on other grounds, 564 So. 2d 120 (Fla. 1990). Thus, this Court can, and should, reevaluate its prior decisions in the instant case.

If no mitigation was presented in Mr. Cherry's trial, as the

Court initially believed, then penalty phase counsel was ineffective. However, if there was mitigation presented in Mr. Cherry's trial, then Mr. Cherry was denied a proper appeal of his sentence, due to the deficient sentencing order, which omitted discussion of the specific mitigation and a weighing of the mitigators against the aggravators. See Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990). Moreover, if mitigation was presented, then Mr. Cherry deserves a new penalty phase due to the striking of an aggravator, which the State concedes.[4] See Cherry I, 544 So. 2d at 188. Either way, Mr. Cherry's death sentence should be vacated. Fairness, due process, and this Court's respect for the important role the constitutional right to habeas corpus serves in Florida's death penalty scheme warrants that this Court grant Mr. Cherry relief.

**CLAIM II**

**MR. CHERRY'S CONVICTION IS A RESULT OF A FUNDAMENTAL ERROR WHEREBY MR. CHERRY WAS NOT PERMITTED TO IMPEACH THE PROSECUTION'S PRIMARY WITNESS.**

The State suggests that appellate counsel was not ineffective for failing to raise this claim, because it was not

[4] The State points out that after the Court found that two aggravators were improperly doubled, "a new penalty phase . . . was the more likely result;" the State further states that a new penalty phase was the "likely remedy" at the time of the appeal. (Response at 14, n.3). During Mr. Cherry's direct appeal, the State argued that this improper doubling was harmless, because there no mitigating circumstances existed. (Answer Brief at 16) (Attachment A).

preserved at trial. (Response at 20). The State's assertion is completely refuted by the record. Trial counsel first moved to admit the impeachment evidence. When the State objected, trial counsel strenuously argued that the evidence was relevant, material, and that the State had notice that Mr. Cherry was going to use the evidence. (R. 784-787) As a result, trial counsel properly preserved this issue to be raised on appeal.

The State further argues that appellate counsel eliminated this claim in favor of presenting other stronger claims. With this argument, the State ignores the fact that appellate counsel did plead that "the trial judge unfairly precluded the testimony of a defense witness who would have impeached Lorraine Neloms." Cherry I, 544 So. 2d at 186. However, appellate counsel should have raised the trial court's error to admit the evidence of Ms. Neloms inconsistent statements to law enforcement. Omitting this claim cannot be excused as strategy or allocation of resources as the evidence would have carried more weight than the testimony of the excluded defense witness. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985). Had appellate counsel considered both claims and needed to reject one, it would have been unreasonable to reject the instant claim. The most efficient way to impeach Ms. Neloms's credibility would have been to show the jury that she had made incriminating statements to the police that led to the arrest of her boyfriend; months later, she recanted these

statements; i.e. Ms. Neloms filed a false complaint.

As he stated in his brief, appellate counsel recognized that Ms. Neloms was "the key witness for the state" and that impeaching her credibility was essential. (Initial Brief on direct appeal at 14). By failing to raise an issue that was preserved at trial and that he knew was a strong and important claim, appellate counsel rendered deficient performance.

The State argues that any deficiency by appellate counsel was not prejudicial, because the impeachment evidence was irrelevant. The State bases this claim on its idea that the charges against Mr. Chamberlain were dismissed "well over a year before [Mr.] Cherry's capital trial." (Response at 21). However, this is a mischaracterization of the events.

The charges against Mr. Chamberlain were dismissed on March 10, 1986 (R. 1176) and less than four months later, on July 2, 1986, Mr. Cherry was arrested. These two occurrences are not so remote in time as to be irrelevant. As trial counsel argued, the fact that Ms. Neloms gave inconsistent testimony to law enforcement officers was "entirely relevant to showing her truthfulness" and her history of "charg[ing] someone and then back[ing] out of it." (R. 784)

Because of the temporal proximity and similarity between Ms. Neloms's behavior of making statements to law enforcement officers regarding Mr. Chamberlain, which she later recanted, and

then making statements to law enforcement regarding Mr. Cherry, which led to his arrest, the trial court's error in not raising this claim cannot be deemed harmless. See Garcia v. State, 564 So. 2d 124, 128-29 (Fla. 1990) (reversing a conviction, vacating death sentences, and remanding for a new trial on the grounds that the trial court abused its discretion by excluding impeachment evidence).

Had the court allowed these documents into evidence, the jury would have heard that Ms. Neloms had previously made inconsistent and fickle statements to the police. In addition, defense counsel could have argued that when Ms. Neloms was unhappy with her boyfriend, she had a history of complaining to law enforcement about him; Ms. Neloms's solution to an imperfect relationship was to have law enforcement remove her boyfriend from her life. This evidence could have changed the jury's opinion of Ms. Neloms and the weight they afforded her credibility.

"The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove . . . that there is no reasonable possibility that the error [complained of] contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Nonetheless, the State offers no explanation for how the trial court's error did not contribute to the jury verdict. In rendering a verdict as to Mr. Cherry's

guilt, the jury had to decide who was telling the truth -- Ms. Neloms or Mr. Cherry. From their guilty verdict, it is clear that the jury believed Ms. Neloms's testimony over Mr. Cherry.

This Court "cannot say beyond a reasonable doubt that the jury would have reached the same result" if they had known that Ms. Neloms had a history of making false, inconsistent statements to law enforcement officers in criminal cases against her boyfriends. See Garcia, 564 So. 2d at 129. As a result, Mr. Cherry is entitled to habeas relief.

**CLAIM III**

**THE PROSECUTOR'S EGREGIOUSLY IMPROPER COMMENTS AND ARGUMENTS DURING MR. CHERRY'S TRIAL RENDERED MR. CHERRY'S DEATH SENTENCE UNRELIABLE, IN VIOLATION OF HIS RIGHTS UNDER ARTICLE I, 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.**

The State argues that this claim is procedurally barred and that Mr. Cherry "take[s] the position that this Court's procedural bar finding with respect to the prosecutorial argument claims raised in the Rule 3.850 proceeding gives him license to re-litigate those claims in this habeas petition." (Response 23). However, that rationale is nonsensical, as this Court stated that the instant claim "could have been raised on direct appeal."[5] See

[5] In rejecting this claim, among others, in Mr. Cherry's Motion to Vacate, pursuant to Criminal Rule of Procedure 3.850, the trial court stated that it "could have been and **should have been** raised on direct appeal." Cherry III, 659 So. 2d at 1070

Cherry II, So. 2d at 1072. Consequently, a petition for a writ of habeas corpus is the proper forum to argue that appellate counsel was ineffective for failing to raise the claim on direct appeal.

**CLAIM IV**

**MR. CHERRY WAS DENIED HIS RIGHT TO A TRIAL BEFORE AN IMPARTIAL JURY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN A JUROR ACTED INAPPROPRIATELY AND WHEN THE COURT FAILED TO ADDRESS THIS ISSUE PROPERLY.**

The State contends that, regarding the interaction between a juror and Barbara Wayne, a witness for the prosecution, that "the true facts demonstrate that no impropriety took place." (Response at 25). However, again the State misses the true issue: the record does not indicate the "true facts" or nature of the interaction. The record only indicates the witness's perception and feelings regarding her encounter with the juror. The record does not indicate the perception and feelings of the juror, a person who would cast a vote regarding Mr. Cherry's guilt or innocence.

Moreover, because the juror did not come forward as directed by the court and because the court neglected to confront the juror about the interaction, the court did not handle the matter "appropriately." (Response 25).

The State further suggests that the interaction was

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(emphasis added).

immaterial as it occurred at a time when the juror did not know Mrs. Wayne was a witness. However, the juror then listened to the testimony of Mrs. Wayne, a witness with whom he knew. As such, while hearing and evaluating her testimony, the juror was still exposed to the influences of the interaction he shared with this witness.

Additionally, the State suggests that trial counsel discussed these events with Mr. Cherry and decided to not object. However, nothing in the record supports the State's theory that this occurred; this Court cannot just assume that Mr. Cherry's right to a fair and impartial jury was not violated. See Delap v. State, 350 So. 2d 642, 463 (1977) (reversing conviction and sentence when the Court was unable to ascertain, from the incomplete record, whether the defendant's constitutional rights had been protected and satisfied).

The trial court erred by not questioning the juror about his interaction with a prosecutorial witness, and appellate counsel had a duty to raise this error on appeal. Because he failed to do so, this Court should grant Mr. Cherry a new trial.

## CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Cherry respectfully urges this Court to grant habeas corpus relief.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Kenneth S. Nunnelley, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118-3961, counsel of record, on March ____, 2002.

## CERTIFICATE OF TYPE SIZE AND STYLE

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